

**Exhibit RE-LA-1**



KeyCite Yellow Flag - Negative Treatment

Overruling Recognized by [Blue v. Skolnik](#), D.Nev., July 31, 2012

632 F.3d 1127

United States Court of Appeals,  
Ninth Circuit.

ALLIANCE FOR THE WILD  
ROCKIES; Native Ecosystems  
Council, Plaintiffs–Appellants,

v.

Jane L. COTTRELL, in her official  
capacity as acting Regional Forester;  
United States Forest Service, an agency  
of the United States Department of  
Agriculture, Defendants–Appellees.

No. 09–35756.

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Argued and Submitted Feb. 2, 2010.

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Filed Jan. 25, 2011.

### Synopsis

**Background:** Environmental advocacy group brought suit against United States Forest Service, seeking to enjoin logging project and timber sales. The United States District Court for the District of Montana, [Donald W. Molloy](#), J., denied plaintiff's motion for preliminary injunction. Plaintiff appealed.

**Holdings:** The Court of Appeals, [W. Fletcher](#), Circuit Judge, held that:

serious questions going to merits and hardship balance that tips sharply toward

plaintiff can support issuance of preliminary injunction;

there was likelihood of irreparable harm;

there were at least serious questions on the merits;

balance of hardships tipped sharply in plaintiff's favor; and

public interest favored preliminary injunction.

Reversed and remanded.

Mosman, District Judge, sitting by designation, filed concurring opinion.

Opinion, 613 F.3d 960, amended and superseded.

Opinion, [622 F.3d 1045](#), withdrawn and superseded on denial of rehearing en banc.

### Attorneys and Law Firms

\***1128** [Matthew Kellogg Bishop](#); Western Environmental Law Center, Helena, MT, [Susan Jane McKibben Brown](#), Western Environmental Law Center, Portland, OR, for the appellants.

[John Emad Arbab](#), U.S. Department of Justice, Washington, D.C., [Mark Steger Smith](#), Office of the U.S. Attorney, Billings, MT, for the appellee.

Appeal from the United States District Court for the District of Montana, [Donald W. Molloy](#), District Judge, Presiding. D.C. No. 9:09–cv–00107–DWM.

Before: [WILLIAM A. FLETCHER](#) and [JOHNNIE B. RAWLINSON](#), Circuit Judges, and [MICHAEL W. MOSMAN](#),<sup>\*</sup> District Judge.

<sup>\*</sup> The Honorable [Michael W. Mosman](#), United States District Judge for the District of Oregon, sitting by designation.

Opinion by Judge [WILLIAM A. FLETCHER](#); Concurrence by Judge [MOSMAN](#).

## ORDER

This Court's opinion, filed September 22, 2010, and published at [622 F.3d 1045 \(9th Circuit 2010\)](#), is withdrawn and replaced by the attached opinion and concurrence.

With this filing, the panel has voted unanimously to deny Appellees' petition for rehearing. Judge W. Fletcher and Judge Rawlinson have voted to deny the petition for rehearing en banc, and Judge Mosman so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. [Fed. R.App. P. 35](#). The Appellees' petition for rehearing and petition for rehearing en banc are **DENIED**.

No further petitions for rehearing will be entertained.

[W. FLETCHER](#), Circuit Judge:

## OPINION

Alliance for the Wild Rockies (“AWR”) appeals the district court's denial of its motion for a preliminary injunction. AWR seeks to enjoin a timber salvage sale proposed by the United States Forest Service. Citing [Winter v. Natural Resources Defense Council](#), 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), the district court held that AWR had not shown the requisite likelihood of irreparable injury and success on the merits. After hearing oral argument, we issued an order reversing the district court and directing it to issue the preliminary injunction. [Alliance for Wild Rockies v. Cottrell](#), 385 Fed.Appx. 683 (9th Cir.2010). In this opinion, we now set forth the reasons for our reversal, and we take this opportunity to clarify an aspect of the post-*Winter* standard for a preliminary injunction.

### I. Background

In August and September of 2007, the Rat Creek Wildfire burned about 27,000 acres in the Beaverhead–Deerlodge National Forest in Montana. On July 1, 2009, almost two years later, the Chief Forester of the Forest Service made an Emergency Situation Determination for the Rat Creek Salvage Project (“the Project”). The Emergency

Situation Determination permitted the immediate commencement of the Project's logging without any of the delays that might have resulted from the Forest Service's administrative appeals process.

The Project permits salvage logging of trees on approximately 1,652 of the 27,000 acres that were burned. The logging will take place (and to some degree has already taken place) on thirty-five units of land ranging from 3 to 320 acres in size. The Forest Service describes the purpose of the Project as follows:

... to recover and utilize timber from trees that are dead or dying as a result of the Rat Creek Wildfire or forest insects and disease and reforest the harvested units with healthy trees appropriate for the site. The trees would supply wood to the forest products industry.

A further purpose is to cut trees infested with dwarf mistletoe to prevent transmission to new trees.

Trees to be cut are those from 4 to 15 inches in diameter at breast height ("dbh") that have died or are likely to die as a direct result of fire or insect attack. The Forest Service has provided species-specific guidelines for determining likelihood of mortality. For example, Douglas-fir trees from 4 to 15 inches dbh are to be logged if less than 40% of the pre-fire live crown remains. Other

conifers are to be logged if less than 80% of the pre-fire live crown remains. The severity of insect attacks is to be determined by examining trees for signs such as pitch tubes or boring dust.

Trees that survived the fire but are infected with dwarf mistletoe are to be cut, regardless of size, unless doing so would reduce the number of live trees below the Forest Service's wildlife habitat standard. Uninfested live trees, including those with a dbh larger than 15 inches, are to be cut only if required by safety concerns.

The Project requires construction of 7 miles of temporary roads and reconditioning of about 3 miles of existing roads. After completion of the Project, the temporary roads will be obliterated, and the existing roads will be returned to their current uses, if any.

In April 2009, the Forest Service released an Environmental Assessment ("EA") of the Project for public comment.

On June 15, 2009, the Acting Forest Supervisor for the Beaverhead-Deerlodge National Forest wrote to the Regional Forester requesting that the Chief Forester make an Emergency Situation Determination ("ESD") in connection with the Rat Creek Project. The ESD request stated that the emergency resulted from "rapid deterioration and decay of trees proposed for salvage harvest," noting that "[t]rees that have died or are dying from secondary fire effects are rapidly losing their value and merchantable

volume.” The request stated that immediate commencement of logging would “prevent substantial economic loss to the Federal Government.” The sites to be logged are typically accessible to loggers for only four to five months out of the year due to heavy snowfalls. \*1130 The request stated that the logging needed to commence immediately so that it could be completed before winter arrived.

The request stated further:

An objective for recovering the value of the fire-killed trees is to respond to local, regional, and national needs for commercial timber products. Local economies in Southwest Montana have developed with natural resource utilization as the foundation. This economic structure continues today and is becoming stressed and increasingly unstable due to higher energy prices, and reduced supply of timber from National Forest System lands. As markets decline and harvest activities on private lands decrease, the timber industry in Montana increasingly depends on National Forest System timber supply as an

essential element to keep their mills operational.

On June 22, 2009, the Regional Forester forwarded the request for an ESD to the Chief Forester, noting that a “delay in implementation of activities included in the request would result in substantial loss of economic value to the Federal Government.” On July 1, 2009, the Chief Forester granted the request for an ESD. She wrote:

[A] delay to implementing the project until after any administrative appeals have been reviewed and answered will result in a substantial loss of economic value to the government. Such a delay would push the award of timber sale contracts for the hazard tree and other salvage back to late October 2009, with winter access limitations delaying most operations until summer of 2010. By that time further deterioration of the affected trees will have resulted in a projected loss of receipts to the government of as much as \$16,000 and significantly increased the likelihood of receiving no bids. An absence of bids would push the potential loss to the government to \$70,000 and eliminate an opportunity to accomplish Douglas-fir planting and dwarf mistletoe control objectives.

In evaluating whether an emergency situation exists with this project, I also took note of the importance this project has to the local economy of southwest Montana. I understand the wood products yielded by this project will

be a critical contributor to helping keep local mills operational.

On July 22, 2009, the Forest Service issued the final Environmental Assessment (“EA”) and a Decision Notice and Finding of No Significant Impact (“DN/FONSI”). The Forest Service concluded that the Project would not have a significant effect on the quality of the human environment and that an Environmental Impact Statement (“EIS”) was therefore not required. The Forest Service then initiated a bidding process for the Project. On July 30, 2009, Barry Smith Logging was declared the highest bidder.

Plaintiff AWR filed suit in federal district court alleging violations of the Appeals Reform Act (“ARA”), the National Forest Management Act (“NFMA”), and the National Environmental Protection Act (“NEPA”). In a brief order entered on August 14, 2009, the district court denied AWR's request for a preliminary injunction. After quoting *Winter*, the court wrote, “After reviewing the parties' filings, the Court is convinced Plaintiffs do not show a likelihood of success on the merits, nor that irreparable injury is likely in the absence of an injunction. This determination prevents the issuance of a preliminary injunction at this stage of the proceedings.” The court did not describe or analyze the merits of AWR's claims and did not describe or analyze the harm alleged \*1131 by AWR. The court denied AWR's motion for a stay and injunction pending appeal to this court.

Barry Smith Logging began work on the Project on August 21, 2009. The parties indicated at oral argument that approximately 49% of the planned logging was completed before winter conditions halted operations.

AWR timely appealed the district court's denial of its request for a preliminary injunction. Because a significant amount of the Project remains to be completed, this appeal is not moot.

## II. Standard of Review

We review a district court's denial of a preliminary injunction for abuse of discretion. *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir.2008) (en banc). An abuse of discretion will be found if the district court based its decision “on an erroneous legal standard or clearly erroneous finding of fact.” *Id.* “We review conclusions of law de novo and findings of fact for clear error.” *Id.* at 986–87. We will not reverse the district court where it “got the law right,” even if we “would have arrived at a different result,” so long as the district court did not clearly err in its factual determinations. *Id.* at 987 (internal citations omitted).

## III. Discussion

### A. “Sliding Scale” and “Serious Questions” after *Winter*



In *Winter*, the Supreme Court disagreed with one aspect of this circuit's approach to preliminary injunctions. We had held that the “possibility” of irreparable harm was sufficient, in some circumstances, to justify a preliminary injunction. *Winter* explicitly rejected that approach. *Winter*, 129 S.Ct. at 375–76. Under *Winter*, plaintiffs must establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction. *Id.* The Court wrote, “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Id.* at 374. “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Id.* at 376.

The majority opinion in *Winter* did not, however, explicitly discuss the continuing validity of the “sliding scale” approach to preliminary injunctions employed by this circuit and others. Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits. *See, e.g., Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir.2003). This circuit has adopted and applied a version of the sliding scale approach under which a preliminary injunction could issue where the likelihood of success is such that “serious

questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.” *Id.* That test was described in this circuit as one alternative on a continuum. *See, e.g., Lands Council*, 537 F.3d at 987. The test at issue here has often been referred to as the “serious questions” test. We will so refer to it as well.

The parties in this case have devoted substantial portions of their argument to the question of the continuing validity of the “serious questions” approach to preliminary injunctions after *Winter*. For the reasons that follow, we hold that the “serious \*1132 questions” approach survives *Winter* when applied as part of the four-element *Winter* test. In other words, “serious questions going to the merits” and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met.

Justice Ginsburg explicitly noted in her dissent in *Winter* that the “Court has never rejected [the sliding scale] formulation, and I do not believe it does so today.” *Winter*, 129 S.Ct. at 392 (Ginsburg, J., dissenting). Justice Ginsburg emphasized the importance of the sliding scale approach, writing “[f]lexibility is the hallmark of equity jurisdiction.” *Id.* at 391. As Justice Ginsburg noted, the majority opinion in *Winter* did not disapprove the sliding scale approach. Indeed, some of its language suggests that the approach survives. For example, the Court implied that balancing is appropriate when it indicated that “particular regard” should be paid to “the public consequences

in employing the extraordinary remedy of injunction.” *Winter*, 129 S.Ct. at 376–77.

Our circuit has not yet directly discussed in a published opinion the post-*Winter* viability of the sliding scale approach. In our first post-*Winter* opinion, we recited the *Winter* four-part test and then wrote, “To the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable.” *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.2009). We discussed the holding of *Winter* that a preliminary injunction requires a showing of likely irreparable injury, but we did not discuss whether some version of the sliding scale test survived. *Id.*; see also *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir.2009) (“In *Winter*, the Supreme Court definitively refuted our ‘possibility of irreparable injury’ standard....”); *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 957 (9th Cir.2010) (ultimately applying a more stringent standard in light of First Amendment interests). In *National Meat Association v. Brown*, 599 F.3d 1093, 1097 n. 3 (9th Cir.2010), we wrote, “The district court applied our pre-*Winter* ‘sliding scale’ approach, which required only a ‘possibility of irreparable injury’ if plaintiff is likely to succeed on the merits.” We then held that, although such an error might warrant remand, it was unnecessary in that case because all elements of the *Winter* test had been met. *Id.*

In *Johnson v. Couturier*, 572 F.3d 1067, 1084 (9th Cir.2009), the district court had applied the “serious questions” test and

held that “there are serious questions on the merits and the balance of hardships tips sharply in favor of plaintiff.” The defendant objected that the district court had failed to “consider the element of irreparable harm.” *Id.* We noted that the district court's approach was “questionable post-*Winter*[],” *id.*, but affirmed because the record supported a finding of a “likelihood of irreparable harm,” *id.* at 1085.

Our other post-*Winter* published opinions are largely unilluminating on the question now before us. Some address wholly separate aspects of *Winter*. See, e.g., *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1022–23 (9th Cir.2009) (emphasizing that *Winter* requires consideration of narrow injunctive relief). Others simply recite the *Winter* test without elaboration. See, e.g., *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 721 (9th Cir.2009); *Klein v. City of San Clemente*, 584 F.3d 1196, 1199–1200 (9th Cir.2009).

Three other circuits have directly confronted the question whether some version of a sliding scale test has survived *Winter*. They have split. The Fourth Circuit has \*1133 held that the sliding scale approach is now invalid. *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 347 (4th Cir.2009) (holding that the circuit's prior test, which permitted “flexible interplay” among the elements, “may no longer be applied” after *Winter* ), *vacated on other grounds*, — U.S. —, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010). The Seventh and Second Circuits have held to the contrary.



The Seventh Circuit was the first to hold that the sliding scale test survives *Winter*, and that a weaker claim on the merits can still justify a preliminary injunction depending on the amount of “net harm” that could be prevented by the injunction. Citing *Winter*, Judge Easterbrook wrote:

Irreparable injury is not enough to support equitable relief. There also must be a plausible claim on the merits, and the injunction must do more good than harm (which is to say that the “balance of equities” favors the plaintiff). How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief.

*Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir.2009) (internal citations omitted).

The Second Circuit decision came down after the Supreme Court had decided two post-*Winter* cases, *Munaf v. Geren*, 553 U.S. 674, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008), and *Nken v. Holder*, 556 U.S. 418, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). Prior to

*Winter*, the Second Circuit had employed a “serious questions” sliding scale test:

For the last five decades, this circuit has required a party seeking a preliminary injunction to show (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and balance of hardships tipping decidedly toward the party requesting the preliminary relief. The “serious questions” standard permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction. Because the moving party must not only show that there are “serious questions” going to the merits, but must additionally establish that “the balance of hardships tips *decidedly*” in its favor, its overall burden is no lighter than the one it bears under the “likelihood of success” standard.

*Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir.2010) (emphasis in original; internal quotations omitted).

Judge Walker explained why the Second Circuit's “serious questions” test survived *Winter*:

The value of this circuit's approach to assessing the merits of a claim at the preliminary injunction stage lies in its

flexibility in the face of varying factual scenarios and the greater uncertainties inherent at the outset of particularly complex litigation.

....

The Supreme Court's recent opinions ... have not undermined its approval of the more flexible approach.... None of the three cases comments at all, much less negatively, upon the application of a preliminary injunction standard that softens a strict “likelihood” [of success] requirement in cases that warrant it.

....

**\*1134** If the Supreme Court had meant for *Munaf*, *Winter*, or *Nken* to abrogate the more flexible standard for a preliminary injunction, one would expect some reference to the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself.... We have found no command from the Supreme Court that would foreclose the application of our established “serious questions” standard as a means of assessing a movant's likelihood of success on the merits.... Thus, we hold that our venerable standard for assessing a movant's probability of success on the merits remains valid....

*Id.* at 35–38.

Dicta in two other circuits suggests that they will follow the Seventh and Second Circuits in preserving the flexibility of the sliding scale approach. The Tenth Circuit

has a “modified test,” similar to the “serious questions” test, under which “a movant need only show ‘questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation.’” *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208–09 n. 3 (10th Cir.2009) (quoting *Walmer v. U.S. Dep't of Def.*, 52 F.3d 851, 854 (10th Cir.1995)). Since *Winter*, the Tenth Circuit has mentioned its “modified test” but indicated that it was not applicable to the case before the court. *Id.* The D.C. Circuit has touched upon this issue, noting that *Winter* “does not squarely discuss whether the four factors are to be balanced on a sliding scale.” *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C.Cir.2009).

District courts in our circuit have grappled with the question of the sliding scale approach's validity after *Winter*. District Judge Alsup's analysis bears repeating:

*Winter* concerned the end of the sliding scale where the weaker factor involves injury, not the end of the scale where the weaker factor involves the merits (but the injury is clear and the equities tip in favor of relief). *Winter* can, however, be construed to hold that the moving party must *always* show a probability of success on the merits (as well as a probability of injury).

....

It would be most unfortunate if the Supreme Court or the Ninth Circuit had eliminated the longstanding discretion of a district judge to preserve the *status quo*

with provisional relief until the merits could be sorted out in cases where clear irreparable injury would otherwise result and at least “serious questions” going to the merits are raised....

Can it possibly be that the Supreme Court and Ninth Circuit have taken away the ability of district judges to preserve the *status quo* pending at least some discovery and further hearing on the merits in such cases? This would be such a dramatic reversal in the law that it should be very clearly indicated by appellate courts before a district court concludes that it has no such power.

*Save Strawberry Canyon v. Dep't of Energy*, No. C 08–03494 WHA, 2009 WL 1098888, at \*1–3 (N.D.Cal. Apr.22, 2009) (citing three other district court cases in the Ninth Circuit with similar holdings).

For the reasons identified by our sister circuits and our district courts, we join the Seventh and the Second Circuits in concluding that the “serious questions” version of the sliding scale test for preliminary injunctions remains viable after the Supreme Court's decision in *Winter*. In this circuit, the test has been formulated as follows:

A preliminary injunction is appropriate when a plaintiff demonstrates ...  
**\*1135** that serious questions going to the merits were raised and the balance of hardships tips

sharply in the plaintiff's favor.

*Lands Council*, 537 F.3d at 987 (internal quotations and modification omitted). Of course, plaintiffs must also satisfy the other *Winter* factors. To the extent prior cases applying the “serious questions” test have held that a preliminary injunction may issue where the plaintiff shows only that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor, without satisfying the other two prongs, they are superseded by *Winter*, which requires the plaintiff to make a showing on all four prongs. See *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir.2003) (en banc). But the “serious questions” approach survives *Winter* when applied as part of the four-element *Winter* test. That is, “serious questions going to the merits” and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.

## B. Preliminary Injunction

Because it did not apply the “serious questions” test, the district court made an error of law in denying the preliminary injunction sought by AWR. We conclude that AWR has shown that there is a likelihood of irreparable harm; that there are at least serious questions on the merits concerning the validity of the Forest Service's Emergency Situation

Determination; that the balance of hardships tips sharply in its favor; and that the public interest favors a preliminary injunction.

### 1. Likelihood of Irreparable Harm

*Winter* tells us that plaintiffs may not obtain a preliminary injunction unless they can show that irreparable harm is likely to result in the absence of the injunction. AWR's members use the Beaverhead–Deerlodge National Forest, including the areas subject to logging under the Project, for work and recreational purposes, such as hunting, fishing, hiking, horseback riding, and cross-country skiing. AWR asserts that its members' interests will be irreparably harmed by the Rat Creek Project. In particular, AWR asserts that the Project will harm its members' ability to “view, experience, and utilize” the areas in their undisturbed state.

The Forest Service responds that the Project areas represent only six percent of the acreage damaged by fire. It argues that because AWR members can “view, experience, and utilize” other areas of the forest, including other fire-damaged areas that are not part of the Project, they are not harmed by logging in the Project.

This argument proves too much. Its logical extension is that a plaintiff can never suffer irreparable injury resulting from environmental harm in a forest area as long as there are other areas of the forest that are not harmed. The Project will prevent the use and enjoyment by AWR members of

1,652 acres of the forest. This is hardly a de minimus injury.

“[T]he Supreme Court has instructed us that ‘[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.’” *Lands Council*, 537 F.3d at 1004. Of course, this does not mean that “any potential environmental injury” warrants an injunction. *Id.* But actual and irreparable injury, such as AWR articulates here, satisfies the “likelihood of irreparable injury” requirement articulated in *Winter*.

### 2. Likelihood of Success on the Merits

AWR's strongest argument on the merits is that the Forest Service has violated **\*1136** the Appeals Reform Act (“ARA”) and its implementing regulations by granting the Emergency Situation Designation (“ESD”). Regulations promulgated under the ARA provide that most Forest Service decisions are appealable through an administrative process. *See* 36 C.F.R. § 215.1 *et seq.*; Forest Service Decisionmaking and Appeals Reform Act, Pub.L. No. 102–381, Title III, § 322, 106 Stat. 1374, 1419–21 (1992). The administrative appeals process would ordinarily be available for the Project at issue in this case. 36 C.F.R. § 215.11(a) (including as appealable decisions those for “projects and activities implementing land and resource management plans ... documented in a Record of Decision (ROD) or Decision Notice (DN)”). If the Forest Service decision had been appealed

administratively, there would have been an opportunity for members of the public, including plaintiffs, to object to the Project on various grounds. Implementation would then have been delayed until at least “the 15th business day following the date of appeal disposition.” 36 C.F.R. § 215.9(b).

The regulations provide an exception to the appeals process when the Forest Service makes an ESD. An ESD allows work to begin on a project as soon as notice of the otherwise appealable project decision is appropriately published. 36 C.F.R. § 215.10(c). The regulations define an Emergency Situation as “[a] situation on National Forest System (NFS) lands for which immediate implementation of all or part of a decision is necessary for relief from hazards threatening human health and safety or natural resources on those NFS or adjacent lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed.” 36 C.F.R. § 215.2.

In granting the ESD for this Project, the Chief Forester considered three factors: (1) the loss of receipts to the government due to delayed commencement of the Project; (2) the potential loss of an “opportunity to accomplish Douglas-fir planting and dwarf mistletoe control objectives”; and (3) the “importance this project has to the local economy of southwest Montana.” We hold that, at a minimum, there are “serious questions” on the merits whether these three factors are sufficient to justify the ESD. We

consider in turn the three factors upon which the Chief Forester relied.

First, the potential loss of receipts to the government resulting from the delay inherent in the appeals process was not great. The Chief Forester wrote that a delay of the commencement of the project until the summer of 2010 would result in a “projected loss of receipts to the government of as much as \$16,000.” The Chief Forester wrote, in addition, that if the commencement of the project were delayed until 2010, this would “significantly increase[ ] the likelihood of receiving no bids.” “An absence of bids would push the potential loss to the government to \$70,000.” With all due respect to the budgetary concerns of the Forest Service, a loss of anticipated revenues to the government of “as much as \$16,000,” or even a “potential loss” of \$70,000 in the event of no bids, is likely not a “substantial loss ... to the Federal Government.”

Even if \$70,000 might, in some contexts, constitute a “substantial loss,” that figure here is highly speculative. The Chief Forester indicated that a one-year delay would “significantly increase[ ] the likelihood of receiving no bids,” but we cannot know precisely what that statement means. We do know that with a 2009 commencement date, multiple bids were submitted almost immediately, and one was accepted. The \*1137 likelihood of not receiving a bid in 2009 appears to have been essentially zero. An increase from a likelihood of essentially 0% to a likelihood of 10% would be a significant increase in likelihood. But a 10%



risk of receiving no bids results in a risk-adjusted loss of 10% of \$70,000, or \$7,000. A risk-adjusted loss of \$7,000 is not significant.

[13] Second, the loss of the opportunity to “accomplish Douglas-fir planting and dwarf mistletoe objectives” would be an actual loss only if there were no successful bid on the Project. That is, the Chief Forester concluded that if there were a bid on the Project, the monetary loss to the government would be “as much as \$16,000.” But in that event, there would be no loss of opportunity to plant Douglas firs or to control dwarf mistletoe, for those objectives would be accomplished by means of the logging contract. Only if there were no bids on the contract would the opportunity be lost. For the reasons just discussed, the possibility of no bids appears to us to be highly speculative. In addition, the Forest Service did not even attempt to quantify the extent of its mistletoe abatement objectives that would be achieved through this Project. It is unclear from the record whether the acres selected are particularly infested with mistletoe and therefore the Project is essential to the Forest Service's goals, or if mistletoe abatement on these acres is simply a serendipitous byproduct of the Project.

Third, the Chief Forester took into account the importance of the Project to the local economy of southwest Montana. As discussed below, this factor is relevant to the public interest element of the preliminary injunction analysis. But the impact of a project on a local economy is not one of the factors the Chief Forester was permitted to consider in deciding whether to issue

an ESD. Under Forest Service regulations, she was permitted to consider “hazards threatening human health and safety or natural resources” and any “substantial loss of economic value to the Federal Government.” 36 C.F.R. § 215.2. Neither the regulation, nor the ARA, permits consideration of the local economy in making an ESD determination. Thus, in relying on the third factor, the Chief Forester “relied on factors Congress did not intend [her] to consider.” *Lands Council*, 537 F.3d at 987.

Finally, we note that the Forest Service has not been able to make clear to us, either in its briefing or at oral argument, why it waited so long to request an ESD. The Rat Creek fire occurred in August and September of 2007. The ESD was requested, and then issued, almost two years later. The delay in requesting an ESD obviously undermines the Chief Forester's determination in July 2009 that there was an Emergency Situation that justified the elimination of otherwise available administrative appeals.

We therefore conclude that AWR has, at a minimum, raised “serious questions” on the merits of its claim regarding the validity of the Chief Forester's Emergency Situation Determination.

### 3. Balance of Hardships

We conclude that the balance of hardships between the parties tips sharply in favor of AWR. When the question was before the district court, logging was contemplated



on 1,652 acres of land in the Beaverhead–Deerlodge National Forest. Once those acres are logged, the work and recreational opportunities that would otherwise be available on that land are irreparably lost.

In addition, AWR was harmed by its inability to participate in the administrative appeals process, and that harm is \*1138 perpetuated by the Project's approval. The administrative appeals process would have allowed AWR to challenge the Project under both NFMA and NEPA, and to seek changes in the Project before final approval by the Forest Service. Such administrative appeals sometimes result in significant changes to proposed projects.

The hardship to the Forest Service, set against the hardship to AWR, is an estimated potential foregone revenue of “as much as \$16,000,” and a much more speculative loss of up to \$70,000. These foregone revenues are so small that they cannot provide a significant counterweight to the harm caused to AWR. In addition, as noted above, the Forest Service's opportunity to mitigate mistletoe infestation and to replant Douglas firs is tied to whether the Project occurs or not. Because we conclude that the risk that the project will not occur at all is speculative, those lost opportunities similarly cannot outweigh the harm to AWR.

The balance of the hardships here tips sharply enough in favor of AWR that a preliminary injunction is warranted in light of the serious questions raised as to the merits of its ARA claim. That decision,

however, does not end our analysis, as the preliminary injunction must also be in the public interest.

#### 4. Public Interest

In this case, we must consider competing public interests. On the side of issuing the injunction, we recognize the well-established “public interest in preserving nature and avoiding irreparable environmental injury.” *Lands Council*, 537 F.3d at 1005. This court has also recognized the public interest in careful consideration of environmental impacts before major federal projects go forward, and we have held that suspending such projects until that consideration occurs “comports with the public interest.” *S. Fork Band Council*, 588 F.3d at 728. While that public interest is most often noted in the context of NEPA cases, we see no reason why it does not apply equally to violations of the ARA. In the ARA, Congress specifically identified the process through which it wanted the Forest Service to make project decisions such as this one. It comports with the public interest for the Forest Service to comply faithfully with those procedures and to use the exceptional emergency procedures sparingly and only in compliance with its own implementing regulations.

We will not grant a preliminary injunction, however, unless those public interests outweigh other public interests that cut in favor of *not* issuing the injunction. See *Lands Council*, 537 F.3d at 1005 (“Consistent with *Amoco Production Company*, we have held that the public interest in preserving nature

and avoiding irreparable environmental injury outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim.”). “The public interest analysis for the issuance of a preliminary injunction requires us to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief.” *Cal. Pharmacists Ass'n v. Maxwell–Jolly*, 596 F.3d 1098, 1114–15 (9th Cir.2010) (internal quotations omitted).

The public interests that might be injured by a preliminary injunction here, however, do not outweigh the public interests that will be served. The primary public interest asserted by the Forest Service is that the Project will aid the struggling local economy and prevent job loss. The effect on the health of the local economy is a proper consideration in the public interest analysis. The Forest Service asserts that the Project would directly create \*1139 18 to 26 temporary jobs and would have indirect beneficial effects on other aspects of the local economy. The record before us reflects that the jobs in question, and, for the most part, the indirect effects, will begin and end with work on the Project which is now expected to be completed in 2010.

On these facts, we conclude that issuing the injunction is in the public interest.

### Conclusion

We conclude that the district court erred in denying AWR's request for a preliminary

injunction. AWR has established a likelihood of irreparable injury if the Project continues. AWR has also established serious questions, at the very least, on the merits of its claim under the ARA. Because AWR has done so with respect to its claim under the ARA, we do not reach its claims under NFMA and NEPA. The balance of hardships between the parties tips sharply in favor of AWR. Finally, the public interest favors a preliminary injunction.

We therefore **REVERSE** and **REMAND** for further proceedings consistent with this opinion.

MOSMAN, District Judge, concurring:

Today's holding that the “serious questions” test remains valid post-*Winter* is an important one for district courts tasked with evaluating requests for preliminary injunctions. The task is often a delicate and difficult balancing act, with complex factual scenarios teed up on an expedited basis, and supported only by limited discovery. A sliding scale approach, including the “serious questions” test, preserves the flexibility that is so essential to handling preliminary injunctions, and that is the hallmark of relief in equity. *See Winter*, 129 S.Ct. at 391 (Ginsburg, J., dissenting); *see also Miller v. French*, 530 U.S. 327, 361, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000) (Breyer, J., dissenting) (“[I]n certain circumstances justice requires the flexibility necessary to treat different cases differently—the rationale that underlies equity itself.”); *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982) (“The essence of equity jurisdiction

has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.”) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944)); *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946) (“Equity eschews mechanical rules; it depends on flexibility.”).

While the Supreme Court cabined that flexibility with regard to the likelihood of harm, there are good reasons to treat the likelihood of success differently. As between the two, a district court at the preliminary injunction stage is in a much better position to predict the likelihood of harm than the likelihood of success. In fact, it is not unusual for the parties to be in rough agreement about what will follow a denial of injunctive relief. In this case, for example, the parties agree that more than 1,600 acres would be logged in the absence of an injunction. While they disagree about the implications of the logging—such as the extent of environmental impact or the value of natural recovery—the mere fact of logging is undisputed.

But predicting the likelihood of success is another matter entirely. As mentioned, the whole question of the merits comes before the court on an accelerated schedule. The parties are often mostly guessing about important factual points that go, for example, to whether a statute has been violated, whether a noncompetition agreement is even valid, or whether a patent is \*1140 enforceable. The arguments that flow from the facts, while not exactly half-baked, do not have the clarity and development that will come later at summary judgment or trial. In this setting, it can seem almost inimical to good judging to hazard a prediction about which side is likely to succeed. There are, of course, obvious cases. But in many, perhaps most, cases the *better* question to ask is whether there are serious questions going to the merits. That question has a legitimate answer. Whether plaintiffs are likely to prevail often does not.

### All Citations

632 F.3d 1127, 72 ERC 1711, 11 Cal. Daily Op. Serv. 1098, 2011 Daily Journal D.A.R. 1363

**Exhibit RE-LA-2**

# International Centre for Settlement of Investment Disputes

**Burlington Resources Inc. and others**  
CLAIMANTS

v.

**Republic of Ecuador**  
**and**  
**Empresa Estatal Petróleos del Ecuador (PetroEcuador)**  
RESPONDENTS

ICSID Case No. ARB/08/5

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**PROCEDURAL ORDER No. 1**  
**on Burlington Oriente's Request for Provisional Measures**

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Rendered by an Arbitral Tribunal composed of:  
Prof. Gabrielle Kaufmann-Kohler, President  
Prof. Brigitte Stern, Arbitrator  
Prof. Francisco Orrego Vicuña, Arbitrator

Secretary of the Tribunal  
Marco Tulio Montañés-Rumayor

Date: June 29, 2009

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## **I. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Subject matter of this Order**

1. The present order deals with a request for provisional measures, by which Burlington Resources Oriente Limited (“Burlington Oriente”; to the exclusion of the other Claimants in this arbitration) seeks the following relief from the Arbitral Tribunal:
  - (i) that Ecuador and PetroEcuador and/or their agencies or entities refrain from demanding payment of amounts allegedly due under Law No. 2006-42 and commencing any action or adopting any resolution or decision that may directly or indirectly lead to the forced or coerced payment of any amount relating to Law No. 2006-42;
  - (ii) that Ecuador and PetroEcuador and/or their agencies or entities refrain from making or implementing any measure, decision or resolution which directly or indirectly affects the legal situation of or is intended to terminate the Block 7 and 21 PSCs; and
  - (iii) that Ecuador and PetroEcuador and/or their agencies or entities refrain from engaging in any other conduct that aggravates the dispute between the parties and/or alters the status quo, including commencing any action or adopting any resolution or decision that directly or indirectly affects the legal or physical integrity of Burlington Oriente’s representatives.

### **B. Origin of the dispute**

2. The present dispute originates from two production sharing contracts (“PSCs”) for the exploration and exploitation of oil fields in the Amazon Region. The first contract relates to Block 7. It was concluded on 23 March 2000 between Kerr McGee Ecuador Energy Corporation, Preussag Energie GMBH, Sociedad Internacional Petrolera S.A., Compañía Latinoamericana Petrolera Numero Dos S.A., on the one hand and the Republic of Ecuador (“Ecuador”) by the intermediary of Empresa Estatal Petróleos del Ecuador (“PetroEcuador”), on the other hand (the “Block 7 PSC”). The second contract relates to Block 21. It was concluded on 20 March 1999 between Oryx Ecuador Energy Company, Santa Fe Minerales del Ecuador S.A., Sociedad Internacional Petrolera S.A. and Compañía

Latinoamericana Petrolera S.A., on the one hand, and Ecuador by the intermediary of PetroEcuador, on the other hand (the “Block 21 PSC”). Burlington Resources Oriente Limited (“Burlington Oriente”) alleges that it now holds a 42.5% interest in the Block 7 PSC and a 46.25% interest in the Block 21 PSC, an allegation that remained unchallenged. Perenco Ecuador Limited (“Perenco”) is the operator of Blocks 7 and 21.

3. Both PSCs contain tax stabilization clauses, a choice of Ecuadorian law, and an ICSID arbitration clause.
4. According to its Article 6(2), the Block 7 PSC will expire on 16 August 2010. By contrast, pursuant to Articles 6(2)(5) and 6(3) of the Block 21 PSC, the period of exploitation for such PSC is twenty (20) years from the date of authorization of PetroEcuador, *i.e.* allegedly until 2021, being specified that by letter of 24 December 2008 (Exhibit C49) the Ministry of Energy and Mines invited Perenco to appoint a negotiating team for the early termination of Block 21 PSC (as confirmed by the Ministry’s letter of 26 January 2009 – Exhibit E3).
5. Burlington Oriente and Perenco formed a Consortium, which is responsible for the tax obligations derived from the PSCs.
6. On 19 April 2006, Ecuador enacted Law No. 2006-42 (“Law 42”), which amended the Hydrocarbons Law of Ecuador as follows:

**“[c]ontracting companies** having Hydrocarbons exploration and exploitation participation agreements in force with the Ecuadorian State pursuant to this Law, without prejudice to the volume of crude oil which may correspond thereto according to their participation, in the event the actual monthly average selling price for the FOB sale of Ecuadorian crude oil exceeds the monthly average selling price in force at the date of subscription of the agreement expressed at constant rates for the month of payment, **shall grant the Ecuadorian State a participation of at least 50% over the extraordinary revenues caused by such price difference** [...]” (Exhibit C7, Article 2; emphasis added)

7. Decrees Nos. 1583 (29 June 2006) and 1672 (13 July 2006) spelled out the method of calculation of such 50% participation. From the record, it appears that the “*reference price*” (that is “*the monthly average selling*

*price in force at the date of subscription of the agreement expressed at constant rates for the month of payment*) is USD 25 per barrel for Block 7 (Transcript, p.163) and USD 15 per barrel for Block 21 (Exhibit C41). In other words, if *“the actual monthly average selling price for the FOB sale of Ecuadorian crude oil”* amounted for instance to USD 40, Ecuador's participation would be 50% of USD 15, *i.e.* USD 7.5, for Block 7 and 50% of USD 25, *i.e.* USD 12.5, for Block 21.

8. On 18 October 2007, Ecuador published Decree No. 662 (“Decree 662”; from here, any reference to Law 42 includes Decree 662 unless otherwise specified), which amended Decree No. 1672 and increased the participation on *“extraordinary revenues”* pursuant to Law 42 from 50 percent to 99 percent. Using the same example as in the preceding paragraph, Ecuador’s participation would be 99% of USD 15, *i.e.* USD 14.85, for Block 7 and 99% of USD 25, *i.e.* 24.75, for Block 21 crude.
9. From the enactment of Law 42 until June 2008, *i.e.* during eighteen months after the adoption of Law 42 and eight months after Decree 662, the Consortium made the payments due under these texts to the State (hereinbelow, the expression “Law 42 payments” will include payments under Decree 662, unless otherwise specified). Specifically, by June 2008, the Consortium alleges that it *“had made Law No. 2006-42 payments for Block 7 and 21 to Ecuador in excess of US\$396.5 million”* (Request for provisional measures, para.25).
10. Thereafter, the Consortium ceased to make such payments to the Respondent. Instead, it deposited the monies owed under Law 42 (and Decree 662) in an alleged total amount of USD 327.4 million (USD 171.7 million for Block 7 and USD 155.7 million for Block 21) into two segregated accounts, over which it keeps control.
11. Following the decision of Burlington Oriente to reject Ecuador’s proposal to amend the Block 7 and 21 PSCs, Ecuador allegedly threatened to seize assets of the Consortium in order to collect unpaid amounts relating to Law 42 and to terminate the Block 7 and Block 21 PSCs. Notices were

served by PetroEcuador on Perenco (Exhibit C55), in order to collect monies in the amount of USD 327,467,447.00 million (for the entire Consortium).

12. On 19 February 2009, Ecuador and PetroEcuador (through the Executory Tribunal of PetroEcuador) instituted so-called *coactiva* proceedings to enforce the payment of USD 327,467,447.00, corresponding to the Consortium's allegedly unpaid amounts under Law 42.
13. On 25 February 2009, PetroEcuador proceeded to serve its third notice of the *coactiva* process on Perenco, which filed an action before the Civil Judge of Pichincha against any further actions that could be taken within the *coactiva* process<sup>1</sup>.
14. On 3 March 2009, the *coactiva* administrative tribunal ordered the immediate seizure of all Block 7 and 21 crude production and cargos produced by Perenco, which decision was confirmed by the Civil Judge of Pichincha on 9 March 2009 (Exhibit C60).
15. At the hearing, Burlington Oriente asserted that the “[coactiva judge] *elected to treat it [the debt for payments under Law 42] as if it was res judicata, and then went ahead, seized the assets, and auctioned off – and auctioned them off for payment.*” (Transcript, pp.27-8). The Respondents did not rebut such statement. They had actually stated in a letter of 3 March 2009 that “*steps have been, or will imminently be, taken by the ‘coactivas judge’ to seize certain assets in satisfaction of the debts claimed in C-55 to Burlington Oriente’s Request for Provisional Measures*”. Although no amounts were specified, there is no dispute that Ecuador has seized certain quantities of oil produced by Burlington. By contrast, it has not been shown that other assets such as production equipment have been seized.

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<sup>1</sup> It is unclear whether Perenco alone, or the whole Consortium (as stated by the Respondent, see para.40 of the Rejoinder) filed an action before the Ecuadorian courts.

### **C. Request for arbitration**

16. On 21 April 2008, Burlington Resources Inc., Burlington Oriente, Burlington Resources Andean Limited and Burlington Resources Ecuador Limited filed a Request for arbitration with ICSID. They asked for the following relief:

“(a) DECLARE that Ecuador has breached:

- (i) Article III of the Treaty [between the United States and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment] by unlawfully expropriating and/or taking measures tantamount to expropriation with respect to Burlington’s investments in Ecuador;
  - (ii) Article II of the Treaty by failing to treat Burlington’s investments in Ecuador on a basis no less favorable than that accorded nationals; by failing to accord Burlington’s investments fair and equitable treatment, full protection and security and treatment no less than that required by international law; by implementing arbitrary and discriminatory measures against Burlington’s investments; and
  - (iii) Each of the PSCs;
- (b) ORDER Ecuador: (i) to pay damages to Burlington for its breaches of the Treaty in an amount to be determined at a later stage in these proceedings, including payment of compound interest at such a rate and for such period as the Tribunal considers just and appropriate until the effective and complete payment of the award of damages for the breach of the Treaty; and/or (ii) to specific performance of its obligations under the PSCs and pay damages for its breaches of the PSCs in an amount to be determined at a later stage in the proceedings, including interest at such a rate as the Tribunal considers just and appropriate until the complete payment of all damages for breach of the PSCs.
- (c) AWARD such other relief as the Tribunal considers appropriate; and
- (d) ORDER Ecuador to pay all of the costs and expenses of this arbitration, including Burlington’s legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID’s other costs”.

### **D. Procedural history**

17. On 20 February 2009, Burlington Oriente filed a Request for provisional measures (the “Request”).

18. The Request was accompanied by a number of exhibits, including a witness statement from Mr. Alex Martinez. It included a request for a temporary restraining order with immediate effect.
19. On 23 February 2009, the First Respondent (Ecuador) filed a response to the Claimant's request for a temporary restraining order. It in particular undertook "*to serve prior notice on the Tribunal, granting enough time for the Tribunal to act as necessary, before it takes any measure that seeks to enforce the debts claimed in exhibit C-55 to the request for Provisional Measures*". On the basis of this undertaking, the Tribunal considered that it could dispense with reviewing whether a temporary order with immediate effect was justified pending determination of the application for provisional measures.
20. Burlington Oriente renewed its request for a temporary restraining order on 25 February 2009 alleging that the third *coactiva* notice had been given and that three days thereafter the Respondents could start seizing assets. The First Respondent replied on 26 February 2009 and reiterated its undertaking.
21. On 27 February 2009, the Arbitral Tribunal again resolved that there was no need to rule on Burlington Oriente's request in view of Ecuador's repeated assurances.
22. On 3 March 2009, Burlington Oriente again repeated its request for a temporary restraining order, owing to the alleged imminence of the seizures of Burlington Oriente's assets pursuant to two orders issued by the *coactiva* tribunal on 3 March 2009.
23. On 4 March 2009, the First Respondent filed a preliminary reply to Burlington Oriente's Request for provisional measures (the "Preliminary Reply").
24. On 6 March 2009, in light of the information received three days earlier, the Arbitral Tribunal recommended "*that the Respondents refrain from engaging in any conduct that aggravates the dispute between the Parties*".



*and/or alters the status quo until it decides on the Claimants' Request for Provisional Measures or it reconsiders the present recommendation, whichever is first.*" In issuing such recommendation, the Arbitral Tribunal considered that the requirements of urgency and of necessity were met. It in particular considered that Burlington Oriente's right to have its interests effectively protected by way of provisional measures was sufficient to demonstrate necessity in the circumstances.

25. The First Respondent filed its Reply to Burlington Oriente's Request for provisional measures (the "Reply"), together with a Request for reconsideration of the Tribunal's recommendation of 6 March 2009, on 17 March 2009. On 25 March 2009, the Claimant filed a Reply to the First Respondent's request for reconsideration of the Tribunal's recommendation on 25 March 2009. The Arbitral Tribunal denied the First Respondent's request for reconsideration on 3 April 2009 on the ground that no changed circumstances called for reconsideration and that the hearing on provisional measures was to take place shortly thereafter.
26. The Claimants filed their Response to Ecuador's Replies to the Request for provisional measures on 27 March 2009 (the "Response") and the Respondent filed their Rejoinder to Burlington Oriente's Request for provisional measures on 6 April 2009 (the "Rejoinder").
27. The hearing on provisional measures took place on 17 April 2009 in Washington, D.C. It was attended by the following persons:

*Members of the Tribunal*

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal

Professor Brigitte Stern, Arbitrator

Professor Francisco Orrego Vicuña, Arbitrator

*ICSID Secretariat*

Mr. Marco T. Montañés-Rumayor, Secretary of the Tribunal

*Representing the Claimants*

Ms. Aditi Dravid, ConocoPhillips Company  
Mr. Alex Martínez, Burlington Resources Oriente Limited  
Mr. Alexander Yanos, Freshfields Bruckhaus Deringer US LLP  
Ms. Noiana Marigo, Freshfields Bruckhaus Deringer US LLP  
Mr. Viren Mascarenhas, Freshfields Bruckhaus Deringer US LLP  
Mr. Javier Robalino-Orellana, Pérez Bustamante & Ponce Abogados  
Cía Ltda.

*Representing First Respondent Republic of Ecuador*

Mr. Alvaro Galindo Cardona, Director de Patrocinio Internacional  
Procuraduría General del Estado  
Mr. Juan Francisco Martínez, Procuraduría General del Estado  
Mr. Felipe Aguilar, Procuraduría General del Estado  
Mr. Eduardo Silva Romero, Dechert LLP  
Mr. George K. Foster, Dechert LLP  
Mr. José Manuel García Represa, Dechert LLP

*Representing Second Respondent PetroEcuador*

Dr. José Murillo Venegas, Empresa Estatal Petróleos del Ecuador  
Dr. Wilson Narváez, Empresa Estatal Petróleos del Ecuador

At the hearing, the Tribunal heard the Parties' oral arguments as well as the testimony of Mr. Martinez. A transcript was made in English and Spanish and distributed to the Parties.

**II. PARTIES' POSITIONS**

**A. Claimant's position**

28. The Claimant argues that the test to be applied to provisional measures is twofold: urgency and necessity to spare significant harm to a Party's rights.
29. It understands the first requirement of urgency in a broad fashion that includes situations in which protection cannot wait until the award. In the

present case, it submits that urgency arises out of the Respondents' plan to enforce all amounts due under Law 42.

30. With respect to necessity, the Claimant stresses that the distinction between "significant" and "irreparable" harm does not entail consequences in the present case. According to the Claimant, irreparable harm is not required under the ICSID Convention or international law, and a broad meaning has been given to the phrase by a number of international tribunals (*Paushok v. Mongolia*, *City Oriente v. Ecuador*, *Saipem v. Bangladesh*). It further submits that ICSID arbitral tribunals have interpreted "*necessity*" for provisional measures not so much as a need to prevent "*irreparable*" harm but as a need to spare "*significant harm*". According to the Claimant, ICSID tribunals have also given careful consideration to the proportionality of the measures when considering if they are necessary.
  
31. The Claimant argues that necessity exists here in three respects:
  - (i) Provisional measures are necessary to preserve the Claimant's rights under Article 26 of the ICSID Convention and Rule 39(6) of the ICSID Arbitration Rules pursuant to which "[...] *once the parties have consented to ICSID arbitration, they cannot resort to other forums in respect to the subject matter of the dispute before the ICSID Tribunal.*" (Response, para.32). The Claimant contends that through the *coactiva* proceedings, the Respondents seek provisional relief against it in contravention to the said rights.
  - (ii) Provisional measures are necessary to protect Burlington Oriente's independent right to specific performance of the Block 7 and 21 PSCs. The right to specific performance exists under Ecuadorian law, as provided by Article 1505 of the Ecuadorian Civil Code and confirmed by the Supreme Court of Ecuador in the case of *Tecco v. IEOS*. The Claimant also argues that Burlington Oriente's right to specific performance would not survive termination of the PSCs and that it is a property right that deserves protection to prevent its dissipation or destruction. The Claimant substantially argues that the Respondents' measures will irreversibly end Burlington Oriente's actual right to seek specific performance of the PSCs by effectively terminating them.
  - (iii) Provisional measures are necessary to protect Burlington Oriente's self-standing rights to the preservation of the *status quo*, non-

aggravation of the dispute, and preservation of the award. These rights are in danger of being irreparably harmed by the actions of the Respondents. In particular, according to the Claimant, the enforcement of Law 42 would alter the *status quo* and aggravate the dispute, as well as frustrate the effectiveness of the award, particularly of an award of specific performance.

32. The Claimant adds that its request for provisional measures not only responds to the necessity criterion, but also fulfills the proportionality requirement. They point out that “[s]ince Ecuador has not enforced Law No. 2006-42 since June 2008, when the Consortium began depositing it into a segregated account, no additional burden would be imposed upon Ecuador if the Tribunal authorized the Consortium or Burlington Oriente to continue paying such amounts into a segregated account or into an official escrow account.” (Request, para.74).
33. The Arbitral Tribunal further notes the statement made by Mr. Alex Martinez, a member of the Board of Directors for Burlington Oriente and Latin America Partnership Operations and Peru Opportunity Manager for ConocoPhillips Corporation, according to whom “[i]f Ecuador indeed seizes the production assets of the Perenco-Burlington Oriente Consortium and/or the oil produced by the consortium, Burlington Oriente will be forced to exit Blocks 7 and 21 as it will be forced in this context to spend money to produce oil for the sole benefit of PetroEcuador” (Witness Statement of Alex Martinez, para.10).

#### **B. Respondents’ position**

34. In its Preliminary Reply, Reply and Rejoinder, the First Respondent (Ecuador) set out its arguments against the Claimant’s Request. The Second Respondent (PetroEcuador) stated in its letters of 31 March, 2 and 6 April 2009 that it opposed the Claimant’s Request and agreed with the position of the Republic of Ecuador, as expressed in the submissions just referred to. Therefore, the Arbitral Tribunal will thereafter refer to the position expressed in the First Respondent’s submissions as that of both Respondents (on the admissibility of PetroEcuador’s opposition to the Request, see para.43).

35. The Respondents state at the outset of their submissions that the Claimant's acts against the enforcement of a valid Ecuadorian law constitute an interference with the sovereignty of Ecuador. They further contend that a presumption of validity exist in favor of legislative measures adopted by a State, that any loss might be compensated by an award of damages and interest, and that the Claimant admits that it could meet its obligations to pay the disputed amounts, since it stated to have set aside the relevant amounts in U.S. accounts. The Respondents also state that the Claimant's Request is neither urgent nor necessary.
36. The Respondents stress that the applicable test for granting provisional measures is the existence of an urgent need to avoid irreparable prejudice, in accordance with ICJ practice. In particular, they stress that no ICSID tribunal has ever rejected the criterion of "*irreparable*" harm to the benefit of "*significant*" harm. They further state that Burlington Oriente's reliance on *Paushok v. Mongolia* and *City Oriente v. Ecuador* is misplaced, as in the latter case, irreparable harm was met on the facts and, in the former, the arbitral tribunal recognized that it went against the weight of authorities.
37. Furthermore, the Respondents understand urgency as follows: "[...] *action prejudicial to the rights of Burlington Oriente is likely to be taken before the Tribunal can finally decide on the merits of the dispute submitted to it.*" (Preliminary Reply, para. 8). The Respondents also state that "*Burlington Oriente's reliance on a so-called 'proportionality test' confuses the issue*" (Preliminary Reply, para.52).
38. The Respondents do not see the need for protection against the termination of the PSCs as urgent, since Ecuador confirmed on 23 February 2009 to the Arbitral Tribunal that none of the Respondents had taken steps to this effect.
39. The Respondents further opposed the Claimant's arguments asserting that Burlington Oriente has not identified any substantive right requiring preservation through provisional measures:

- (i) The *coactiva* process does not threaten the Claimants' rights under Article 26 of the ICSID Convention and Rule 39(6) of the ICSID Arbitration Rules. Such process is an administrative not a judicial proceeding. Consequently, it does not involve the determination of any of the matters at issue in this arbitration. The only judicial proceedings before the Ecuadorian courts (namely the proceedings in front of the Civil Court of Pichincha) were initiated by the Claimants, and not by any of the Respondents.
- (ii) Burlington Oriente has no right to specific performance of the PSCs, let alone one that would be irreparably harmed absent provisional relief. It has not established that Ecuador actually intended to terminate the PSCs. To the contrary, the government "***expressly disavowed any such intention.***" (Rejoinder, para.21, with emphasis). Even if Ecuador had such intent, Burlington Oriente would still have no right to specific performance under international law. As for Ecuadorian law, it does not recognize a right to specific performance when the subject matter of the obligation is contrary to the law, which would be the case here because the enforcement of the PSCs would breach Law 42. Moreover, there is no more basis for a tribunal to restrain a sovereign State from terminating a contract than to order a State to reinstate a contract after termination.
- (iii) The preservation of the *status quo*, the non-aggravation of the dispute, and the preservation of the effectiveness of the award are not free standing rights in international law, independent from contractual or treaty rights. The preservation of the *status quo* is one of the purposes to be served by preserving rights under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules by way of provisional measures. Even if it had a right to the preservation of the *status quo*, Burlington Oriente is the one who altered this *status quo* by ceasing to pay the amounts due to Ecuador. Finally, there is no risk that the enforcement of Law 42 aggravates the dispute or renders any future award ineffective, since the dispute can easily be resolved through a monetary award.

40. The Respondents further argue that the Claimant's allegations about a threat to the physical and legal integrity of Burlington's representatives is unparticularised and should therefore be rejected.

### III. DISCUSSION

41. The Tribunal will first deal with some preliminary matters (A). Thereafter, it will address the standards applicable to provisional measures in general (B), before reviewing each such standards, *i.e.* the existence of right (C),

urgency (D), and necessity or the need to avoid harm (E). It will finally deal with the issue of the escrow account (F) before setting forth its decision (IV).

**A. PRELIMINARY MATTERS**

42. The Arbitral Tribunal will first deal with a few procedural issues which arose during the hearing of 17 April and in the course of previous written exchanges, namely the timeliness of PetroEcuador's opposition to the Request; Burlington Oriente's use of an alleged statement by President Correa; and the request for relief regarding the alleged threat to the legal and physical integrity of the Claimant's representatives.
43. Burlington Oriente argues that PetroEcuador's endorsement of Ecuador's position on 31 March 2009 (confirmed on 1 and 6 April 2009 and repeated at the hearing, Transcript, p.9) was untimely and should thus not be considered. PetroEcuador attended the hearing without presenting oral argument of its own in accordance with the Tribunal's understanding set out in the latter's letter of 8 April 2009. Since PetroEcuador made no written or oral submissions of its own, but for its adhesion to Ecuador's case, the fact that such adhesion did not respect the briefing schedule did not affect the Claimant's due process rights. The Tribunal would thus find it excessively formalistic to disregard PetroEcuador's endorsement of the First Respondent's position.
44. As a second preliminary matter, the Respondents object to Burlington Oriente's reliance at the hearing on a statement by President Correa in 2008 (Transcript, p.21). Since evidence of such a statement was not in the record then, the Arbitral Tribunal will not consider it for purpose of this decision.
45. As a third preliminary matter, the Respondents submit that Burlington Oriente's request for relief based on the threat to the legal and physical integrity of its representatives has been abandoned (Transcript, pp.90-91). The Arbitral Tribunal indeed notes that Burlington Oriente has not opposed such submission at the hearing. Be this as it may, the allegation of threats



is in any event unsubstantiated Hence, the Tribunal will not further entertain it.<sup>2</sup>

46. As a final observation within these preliminary matters, the Tribunal notes that this order is made on the basis of its understanding of the record as it stands now. Nothing herein shall preempt any later finding of fact or conclusion of law.

## **B. APPLICABLE STANDARDS**

### **1. Legal framework**

47. The relevant rules are found in Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, which are generally considered to grant wide discretion to the Arbitral Tribunal.

48. Article 47 of the ICSID Convention provides that

“[e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the specific rights of either party.”

49. Rule 39 of the ICSID Arbitration Rules reads as follows:

- (1) “At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
- (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

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<sup>2</sup> See, for a similar approach, *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on provisional measures of 17 August 2007, para. 89: “In other words, Claimants are asking a provisional measure in order to avoid a behaviour, which they are not even sure to be intended. This is not the purpose of a provisional measure. Provisional measures are not deemed to protect against any potential and hypothetical harm susceptible to result from uncertain measures, they are deemed to protect the requesting party from an imminent harm.”

- (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

[...]"

It is undisputed by the Parties that the Arbitral Tribunal has the power to order provisional measures prior to ruling on its jurisdiction. The Tribunal will not exercise such power, however, unless there is *prima facie* basis for jurisdiction.

50. The provisional measures were requested by Burlington Oriente, *i.e.* one of the so-called "*Burlington subsidiaries*" (Request for Arbitration, para.1). The "*Burlington subsidiaries*" (that is Burlington Oriente, Burlington Resources Ecuador Limited and Burlington Resources Andean Limited) seek compensation for the Respondents' breach of the PSCs (Request for Arbitration, para.3). As far as Burlington's subsidiaries are concerned, the Claimants assert that ICSID has jurisdiction on the basis of the arbitration clauses embodied in Section 20.3 of the Block 7 PSC and Section 20.2.19 of the Block 21 PSC:

"By the express language of the PSCs for Blocks 7, 21 and 23, the parties consented to ICSID jurisdiction from the moment the ICSID Convention was ratified by Ecuador. Ecuador ratified the ICSID Convention on February 7, 2001. Thus, since February 7, 2001, all parties to the PSCs for Blocks 7, 21 and 23 have consented to ICSID arbitration to resolve the dispute set forth herein." (Request for Arbitration, para.131).

Hence, the Tribunal considers that it has *prima facie* jurisdiction for purposes of rendering this order.

## **2. Requirements for provisional measures**

51. There is no disagreement between the Parties, and rightly so, that provisional measures can only be granted under the relevant rules and standard if rights to be protected do exist (C below), and the measures are urgent (D below) and necessary (E below), this last requirement implying an assessment of the risk of harm to be avoided by the measures. By contrast, the Parties differ on the nature of such harm. The Claimant argues that significant harm is sufficient, while the Respondents insist on

irreparable harm. The Parties further disagree on the type and existence of the rights to be protected. The Tribunal will now review the different requirements for provisional measures just set out and the Parties' divergent positions in this respect.

### **C. EXISTENCE OF RIGHTS**

52. Burlington Oriente asserts that three types of rights need protection by way of provisional measures, namely the right to exclusive recourse to ICSID under Article 26 of the ICSID Convention (1); the rights to the preservation of the *status quo*, the non-aggravation of the dispute and the effectivity of the arbitral award (2); and the right to specific performance of the PSCs (3).

53. At the outset, one notes the Parties' concurrent view that the Tribunal must examine the existence of rights under a *prima facie* standard (Transcript, p.169, 179-80, 199). It cannot require actual proof, but must be satisfied that the rights exist *prima facie*.

#### **1. Right to exclusivity under Article 26 ICSID Convention**

54. In the first place, Burlington Oriente substantially argues that provisional measures are necessary to preserve the exclusivity of ICSID proceedings under Article 26 of the ICSID Convention, which in essential part provides that “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

55. The Claimant submits that matters at issue in the present case are being adjudicated in the *coactiva* process. The Respondents reply that the *coactiva* proceeding is an administrative not a judicial process, that it carries no *res judicata*, and does not preempt the determination of the dispute by this Tribunal.

56. In the Tribunal's view, two questions arise here. First, does a right to the exclusive jurisdiction of ICSID exist as a right that can be protected through provisional measures? If the answer is positive, the second question that arises is whether that right is at risk under the circumstances if no provisional measures are granted.

57. The Tribunal has no doubt about the existence of a right to exclusivity susceptible of protection by way of provisional measures, or in the words of the *Tokios Tokelés v. Ukraine* tribunal:

“Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative.”<sup>3</sup>

58. The existence of such a right being accepted, is the continuation of the *coactiva* process susceptible of putting this right at risk? There is conflicting argumentation on record about the true legal nature and the subject matter of the *coactiva* process (Transcript, pp. 26-7, 49-63, 116-30). The Tribunal is thus unable to come to a conclusion on this issue in the context of this Order. Hence, for purposes of the present limited review, it cannot but hold that Burlington Oriente has not established a *prima facie* case of breach of Article 26 of the ICSID Convention.

**2. Right to the preservation of the *status quo* and non-aggravation of the dispute**

59. Second, Burlington Oriente asserts rights to the preservation of the *status quo*, the non-aggravation of the dispute, and the preservation of the award. The Respondents object that these are neither rights under Article 47 of the ICSID Convention nor free standing rights under international law and that the Claimant can only seek measures that protect the substantive rights in dispute.

60. In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or

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<sup>3</sup> *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Order No. 3 of 18 January 2005, para. 7, citation omitted.

*substantive* rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the *status quo* and to the non-aggravation of the dispute. These latter rights are thus self-standing rights.

61. The Tribunal will now review the right to the preservation of the *status quo* and the non-aggravation of the dispute. Such right focuses on the situation at the time of the measures. By contrast, the right to the protection of the effectivity of the award looks into the future. As such, under the circumstances of this case, it is closely linked with the right to specific performance. The discussion on such latter right, to which the Tribunal refers later in this Order, thus equally disposes of the issue of the protection of the award.
62. The existence of the right to the preservation of the *status quo* and the non-aggravation of the dispute is well-established since the case of the *Electricity Company of Sofia and Bulgaria*<sup>4</sup>. In the same vein, the *travaux préparatoires* of the ICSID Convention referred to the need “to preserve the *status quo* between the parties pending [the] final decision on the merits” and the commentary to the 1968 edition of the ICSID Arbitration Rules explained that Article 47 of the Convention “is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award”<sup>5</sup>.
63. In ICSID jurisprudence, this principle was first affirmed in *Holiday Inns v. Morocco*<sup>6</sup> and then reiterated in *Amco v. Indonesia*. In the latter case, the tribunal acknowledged “the good and fair practical rule, according to which both Parties to a legal dispute should refrain, in their own interest, to do

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<sup>4</sup> *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 5 December 1939, PCIJ series A/B, No 79, p.199. See also the *LaGrand case (Germany v. United States)*, Judgment of 27 June 2001, para. 103, ICJ Reports 2001, p.466.

<sup>5</sup> 1 ICSID Reports 99.

<sup>6</sup> *Holiday Inns S.A. and others v. Kingdom of Morocco* (ICSID Case No. ARB/72/1), Order of 2 July 1972, not public but commented in Pierre Lalive, “The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco) – Some Legal Problems”, BYIL, 1980.

*anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult*<sup>7</sup>.

64. The principle was re-affirmed in *Plama v. Bulgaria*<sup>8</sup> (although with a somewhat more limited approach), *Occidental v. Ecuador*<sup>9</sup>, and *City Oriente v. Ecuador*<sup>10</sup>.
65. There is no doubt in the Tribunal's mind that the seizures of the oil production decided in the *coactiva* proceedings are bound to aggravate the present dispute. At present, both PSCs are in force and, subject to the controversy about the Law 42 payments, appear to be performed in accordance with their terms. If the seizures continue, it is most likely that the conflict will escalate and there is a risk that the relationship between the foreign investor and Ecuador may come to an end.
66. In making this finding, the Tribunal understands Ecuador's arguments about its duties to enforce its municipal law and in particular Law 42. Yet, the ICSID Convention allows an ICSID tribunal to issue provisional measures under the conditions of Article 47. Hence, by ratifying the ICSID Convention, Ecuador has accepted that an ICSID tribunal may order measures on a provisional basis, even in a situation which may entail some interference with sovereign powers and enforcement duties.
67. The Tribunal is also mindful of the Respondents' argument that Burlington Oriente is the one who altered the *status quo* by ceasing to pay the amounts due to Ecuador. It cannot, however, follow this argument. Indeed, the *status quo* at issue, the one that needs protection – provided the other requirements are met – consists in the continuation of the cooperation between the Parties in the framework of the PSCs.

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<sup>7</sup> *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on request for provisional measures of 9 December 1983, ICSID Reports, 1993, p.412.

<sup>8</sup> *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/04), Order of 6 September 2005, para.40.

<sup>9</sup> *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on provisional measures of 17 August 2007, para.96.

<sup>10</sup> *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/06/21), Decision on provisional measures of 19 November 2007, para.55.



68. In conclusion, the Tribunal holds that Burlington Oriente has shown the existence of a right to preservation of the *status quo* and the non-aggravation of the dispute.

**3. Right to specific performance (and to the preservation of the effectivity of the award)**

69. Third, the Claimant asserts a right to specific performance of the PSCs and to the protection of the effectivity of an award that may sanction such right. It is disputed whether specific performance is admissible under Ecuadorian and international law.

70. With respect to international law, Article 35 of the ILC Articles on State responsibility provide for restitution which includes specific performance unless it is materially impossible or wholly disproportionate<sup>11</sup>. Whether specific performance is impossible or disproportionate is a question to be dealt with at the merits stage. It is true that the view has been expressed that the right to specific performance is not available under international law where a concession agreement for natural resources has been terminated or cancelled by a sovereign State. In the instant case, the PSCs are in force which makes it unnecessary to consider that view. As far as Ecuadorian law is concerned, it appears to provide for the remedy of specific performance pursuant to Article 1505 of the Civil Code.

71. Accordingly, at first sight at least, a right to specific performance appears to exist. Some other factual and legal elements seem to support the possibility of specific performance: (i) Burlington Oriente's claim for specific performance is a contract, not a treaty claim; (ii) the PSCs are still being performed, and (iii) they contain a choice of Ecuadorian law and a tax stabilization clause. Thus, at least *prima facie*, a right to specific performance could exist in the present situation. Under the circumstances, the same can be said of the right to the protection of the effectivity of a possible future award.

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<sup>11</sup> See also e.g. *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para.400: "Restitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation."

#### D. URGENCY

72. The Parties agree that there is urgency when it is impossible to wait until the award because actions prejudicial to the rights of the petitioner are likely to be taken before the Arbitral Tribunal decides on the merits of the dispute. They disagree, however, on whether the present facts meet the urgency requirement. The Respondents in particular submit that the threat of termination of the PSCs does not create an urgent situation as Ecuador has confirmed to the Tribunal on 23 February 2009 that the Respondents had taken no steps to this effect.

73. The Arbitral Tribunal agrees that the criterion of urgency is satisfied when, as Schreuer puts it, “a question cannot await the outcome of the award on the merits”<sup>12</sup>. This is in line with ICJ practice<sup>13</sup>. The same definition has also been given in *Biwater Gauff v. Tanzania*:

“In the Arbitral Tribunal’s view, the degree of ‘urgency’ which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measures at a certain point in the procedure before the issuance of an award.”<sup>14</sup>

74. The Tribunal shares the Respondents' opinion that no urgency arises from the alleged threat of termination of the PSCs. The urgency lies elsewhere and is closely linked to the non-aggravation of the dispute discussed in the preceding section, to which the Tribunal refers. Indeed, when the

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<sup>12</sup> Christoph SCHREUER, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, p. 751 (para.17).

<sup>13</sup> In the words of the ICJ, “[w]hereas the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision (see, for example, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, p. 17, para.23; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, Order of 17 June 2003, ICJ Reports 2003, p. 107, para.22 ; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Preliminary Objections, Order of 23 January 2007, p. 11, para.32), and whereas the Court thus has to consider whether in the current proceedings such urgency exists”, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order of 15 October 2008, para.129.

<sup>14</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 1 of 31 March 2006, para.76.

measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition<sup>15</sup>.

#### **E. NECESSITY OR NEED TO AVOID HARM**

75. The Parties concur that the measures must be necessary or in other words that they must be required to avoid harm or prejudice being inflicted upon the applicant. They differ, however, on the required intensity of the harm: “*irreparable*”, *i.e.* not compensable by money, for the Respondents, as opposed to “*significant*” for the Claimant.
76. The Respondents substantially argue that the harm invoked by Burlington Oriente cannot be deemed “*irreparable*” because (i) no production assets were seized and (ii) such harm can easily be made good by a monetary award. They rely in particular on *Occidental Petroleum and other v. Ecuador* to argue that “*a mere increase in damages is not a justification for provisional measures*” (Rejoinder, para.55).
77. The Claimant does not dispute that no production assets were seized, but insists that its operational capacity is severely threatened by the seizures, that the imposition of the Law 42 payments led to a loss on investment in 2008 and prevented a sale of the latter (Testimony of Mr. Martinez, Transcript, pp.117-118 and 114). It also argues that it may have no other choice than to “walk away” from its investment.
78. The words “necessity” or “harm” do not appear in the relevant ICSID provisions. Necessity is nonetheless an indispensable requirement for provisional measures. It is generally assessed by balancing the degree of harm the applicant would suffer but for the measure.
79. The Respondents are right in pointing out that a number of investment tribunals have required irreparable harm in the sense of harm not compensable by monetary damages. The *Occidental* tribunal found that there was no irreparable harm since the Claimants’ harm, if any, could be

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<sup>15</sup> Of the same opinion, in particular, *City Oriente*, Decision on Provisional Measures, para.69.

compensated by a monetary award<sup>16</sup>. In the same vein, the *Plama* tribunal mentioned that it accepted the respondent's argument that the harm was not irreparable if it could be compensated by damages<sup>17</sup>, but did not discuss the matter further. Similarly, the tribunal in *Metaclad v. Mexico* denied the request and underlined that the measures must be required to protect the applicant's rights from “*an injury that cannot be made good by subsequent payment of damages*”<sup>18</sup>.

80. By contrast, the *City Oriente* tribunal distinguished its case from investment cases where the sole relief sought was damages, while *City Oriente* was seeking contract performance<sup>19</sup>. In its decision not to revoke the measures, the tribunal stressed that neither Article 47 of the ICSID Convention nor Arbitration Rule 39 “*require that provisional measures be ordered only as means to prevent irreparable harm*”<sup>20</sup>. In the UNCITRAL investment case of *Paushok v. Mongolia*, the tribunal distinguished *Plama*, *Occidental* and *City Oriente* and concluded that “*irreparable harm*” in international law has a “*flexible meaning*”. It also referred to Article 17A of the UNCITRAL Model Law which only requires that “*harm not adequately reparable by an award of damages is likely to result if the measures are not ordered*”<sup>21</sup>.

81. However defined, the harm to be considered does not only concern the applicant. The *Occidental* tribunal recalled that the risk of harm must be assessed with respect to the rights of both parties. Specifically, it stated that “*provisional measures may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party, in this case, the rights of a sovereign State*”.<sup>22</sup> In the same spirit, the *City Oriente* tribunal stressed the need to weigh the interests at stake against each other. Referring to

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<sup>16</sup> *Occidental*, para.92.

<sup>17</sup> *Plama*, para.46.

<sup>18</sup> *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Decision on a request by the Respondent for an order prohibiting the Claimant from revealing information regarding ICSID Case ARB(AF)/97/1, para.8.

<sup>19</sup> *City Oriente*, Decision on Revocation, para.86.

<sup>20</sup> *Ibid.*, para.70.

<sup>21</sup> *Paushok*, paras.62, 68-69.

<sup>22</sup> *Occidental*, para.93.

Article 17A(1) of the UNCITRAL Model Law, it emphasized the balance of interests that needs to be struck as follows:

“It is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceeds greatly the damage caused to the party affected thereby.”<sup>23</sup>

82. In the circumstances of the present case, this Tribunal finds it appropriate to follow those cases that adopt the standard of “*harm not adequately reparable by an award of damages*” to use the words of the UNCITRAL Model Law. It will also weigh the interests of both sides in assessing necessity.
83. Unlike *Occidental*, this case is not one of only “*more damages*” caused by the passage of time<sup>24</sup>. It is a case of avoidance of a different damage. The risk here is the destruction of an ongoing investment and of its revenue-producing potential which benefits both the investor and the State. Indeed, if the investor must continue to finance operation expenses while making losses, from a business point of view it is likely that it will reduce its investment and maintenance costs to a minimum and thus its output and the shared revenues. There is also an obvious economic risk that it will cease operating altogether. While profit sharing may be legitimate, expecting that a foreign investor will continue to operate a loss making investment over years is unreasonable as a matter of practice. Contrary to the Respondents' assertion pursuant to which the protection would be granted against the investor's own act of “walking away”, the Tribunal considers that the project and its economic standing is at risk regardless of the conduct of the investor.
84. In reaching this conclusion, the Tribunal has paid due attention to the Respondents' argument that the effect of the seizures was economically neutral for the Claimant. Every time oil is seized for a given amount, past due Law 42 debts are extinguished, which would allow the Claimant to withdraw the equivalent amount from the segregated account. Although

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<sup>23</sup> City Oriente, Decision on Revocation, para.72.

<sup>24</sup> Occidental, para.99.

the Claimant replies that it will not touch the monies on the segregated account, the objection is mathematically speaking correct. Yet, it misses the point. Indeed, the risk of further deterioration of the relationship possibly ending with the destruction of the investment would still exist. This is especially, but not exclusively so if the investor is liable to settle both the alleged past due Law 42 payments and the newly accruing ones (Transcript, p.195). The consequences of the end of the investment relationship would affect the investor as well as the State. The latter would then in effect lose future Law 42 payments if they are ultimately held to be due.

85. This last observation shows that provisional measures are in the interest of both sides if they are adequately structured, a matter discussed in the next section.

#### **F. ESCROW ACCOUNT**

86. As an alternative to its main request for relief, Burlington Oriente confirmed at the hearing that it could envisage an escrow account “*where all the funds that are the subject of this dispute could be held pending its resolution*” (Transcript, pp.23-24, esp. lines 16-18). The Arbitral Tribunal notes the Respondents’ argument that such account would be “*unmanageable and inadequate*” (Transcript, p.211, line 12), since it would exclusively cover the Parties in this arbitration, notwithstanding the joint liability of the Consortium and also because an offshore escrow account would be “*inimical to Ecuador’s sovereignty*” (Transcript, p.212, lines 4-5).
87. The Arbitral Tribunal is of the view that the establishment of an escrow account would provide a balanced solution likely to preserve each Party’s rights. The Republic of Ecuador would have the certainty that the amounts allegedly owing would be paid and could later be collected if held to be due. The investor would benefit from the cessation of the *coactiva* process, and although paying significant amounts into the escrow account, would have the assurance that such amounts could later be recovered if held not to be due. Moreover, in reliance on such assurances, one would



reasonably expect both Parties to continue the performance of the PSCs under their terms.


88. The terms and conditions of the escrow account, and other practicalities call for a number of specifications:
- (i) The escrow account shall contain all future and past payments due under Law 42 and Decree 662. Past payments shall include all payments owed by the Claimant and payed into their segregated account. It appears that past payments (in the amount of USD 327.4 million) were made by the Consortium into two segregated U.S. accounts (one for each of the members of the Consortium, see Request, para.25). Therefore, even if the Consortium were jointly liable for its debts as the Respondents allege, the Claimant will be able to separate the payments owed by it from the payments owed by Perenco.
  - (ii) The amounts deposited on the escrow account shall only be released in accordance with a final award, or a settlement agreement duly entered into by the Parties, or with other specific instructions issued by this Tribunal.
  - (iii) The escrow agent shall be an internationally recognized financial institution. For reasons of neutrality, it shall not be an Ecuadorian, North American or Bermuda institution.
  - (iv) Interest earned on the escrow account should be credited to such account and released in accordance with a final award, or a settlement agreement, or other instructions from this Tribunal.
  - (v) The costs incurred by the escrow account shall be borne equally by both Parties but can be made part of the claim for compensation by each Party.

#### **IV. ORDER**

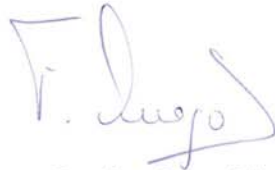
On this basis, the Arbitral Tribunal makes the following order:

1. The Parties shall confer and make their best efforts to agree on the opening of an escrow account at an internationally recognized financial institution incorporated outside of Ecuador, the United States of America and Bermuda;

2. Burlington Oriente shall pay into the escrow account all future and past payments allegedly due under Law 42 and Decree 662, including all payments made by the Claimants into their segregated account;
3. The funds in the escrow account shall only be released in accordance with a final award or a settlement agreement duly entered into by the Parties or with other specific instructions from this Tribunal;
4. The costs of the escrow account shall be borne equally by both Parties and can be made part of the claim for compensation by each Party;
5. The interest accrued on the escrow account shall be credited to such account and released in accordance with a final award, or a settlement agreement, or other instructions from this Tribunal;
6. If the Parties cannot agree on the opening of an escrow account within 60 days from notification of this Order, they shall report to the Arbitral Tribunal setting forth the status of their negotiations and the content of and reasons for their disagreements after which the Arbitral Tribunal will rule on the outstanding issues;
7. The Respondents shall discontinue the proceedings pending against the Claimant under the *coactiva* process and shall not initiate new *coactiva* actions;
8. The Parties shall refrain from any conduct that may lead to an aggravation of the dispute until the Award or the reconsideration of this order. In particular, Burlington Oriente shall refrain from making good on its threat to abandon the project and Ecuador shall refrain from any action that may induce Burlington Oriente to do so;
9. The Order issued by this Tribunal on 6 March 2009 is terminated;
10. Costs are reserved for a later decision or award.



Professor Gabrielle Kaufmann-Kohler  
President of the Tribunal



Professor Francisco Orrego Vicuña  
Arbitrator



Professor Brigitte Stern  
Arbitrator

**Exhibit RE-LA-3**



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Done! Ventures, LLC v. General Electric Co.](#),  
C.D.Cal., January 21, 2011

844 F.2d 668

United States Court of Appeals,  
Ninth Circuit.

CARIBBEAN MARINE  
SERVICES COMPANY, INC., a  
California Corporation; Carlos  
A. Garcia, Plaintiffs–Appellees,

v.

Malcolm BALDRIGE, Secretary of  
Commerce of the United States;  
Anthony Calio, Administrator,  
National Oceanic and Atmospheric  
Administration; William Evans,  
Assistant Administrator for Fisheries,  
National Marine Fisheries Services;  
E.C. Fullerton, Southwest Regional  
Director, National Marine Fisheries  
Service, Defendants–Appellants.

CAROLINE M. CORP., INC.;  
Jose R. Rebelo; Francisco M.  
Nunes, Plaintiffs–Appellees,

v.

Malcolm BALDRIGE, Secretary of  
Commerce of the United States;  
Anthony J. Calio, Administrator,  
National Oceanic and Atmospheric  
Administration; William Evans,  
Assistant Administrator for  
Fisheries Service; E.C. Fullerton,  
Southwest Regional Director,  
National Marine Fisheries  
Service, Defendants–Appellants.

Nos. 87–57845, 87–5821.

Argued and Submitted Dec. 9, 1987.

Decided April 14, 1988.

### Synopsis

Owners and crew members of commercial tuna boats moved for preliminary injunction prohibiting government from placing female observers on board boats to enforce Marine Mammal Protection Act. The United States District Court for the Southern District of California, William B. Enright, J., granted preliminary injunction, and government appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) owners' allegations were insufficient to establish imminent threat of irreparable economic injury; (2) failure to identify possible harm to government was reversible error; and (3) failure to consider government's and public's interest in ensuring equal employment opportunities for women was reversible error.

Reversed.

### Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of California.

Before WALLACE, NORRIS and THOMPSON, Circuit Judges.

### Opinion

WALLACE, Circuit Judge:

The Secretary of Commerce, the Administrator of the National Oceanic and Atmospheric Administration, the Assistant Administrator for Fisheries, National Fisheries Service, and the Southwest Regional Director of the National Marine Fisheries Service (government) appeal two preliminary injunctions prohibiting them from placing female observers on board commercial tuna boats owned and operated by Caribbean Marine Service Co. and Caroline M. Corp. (the owners). We have jurisdiction pursuant to [28 U.S.C. § 1292\(a\)\(1\)](#), and we reverse.

### I

The owners and certain crew members (crew) fish for yellow fin tuna using purse seine nets. To locate the tuna, they scan the water looking for porpoises, which for unknown reasons often swim with the tuna. Nets

are set around the porpoises, and the tuna swimming beneath them are captured when the net is closed or “pursed” around them. During this procedure, many porpoises may be caught in the nets and drowned. In 1970 and 1971, for example, more than 600,000 porpoises were killed in the course of such operations. See [Balelo v. Baldrige](#), [724 F.2d 753, 756 \(9th Cir.\)](#) (en banc) (*Balelo*), cert. denied, [467 U.S. 1252](#), [104 S.Ct. 3536](#), [82 L.Ed.2d 841](#) (1984).

In 1972, Congress enacted the Marine Mammal Protection Act (Act), [16 U.S.C. §§ 1361–1406](#). One of the declared goals of the Act is to reduce the number of incidental kills and injuries to marine mammals permitted in the course of commercial fishing operations. *Id.* § 1371(a)(2). In furtherance of this goal, section 1372 of the Act prohibits the killing or “taking” of any marine mammal except in accordance with permits issued by the Secretary of Commerce (Secretary). *Id.* § 1372. Section 1373 directs the Secretary to prescribe regulations regarding permitted takings of marine mammals and authorizes the Secretary to set quotas restricting the number of porpoises that may be taken pursuant to such permits each year. *Id.* § 1373.

Pursuant to section 1373, the Secretary promulgated regulations requiring permit holders to allow an employee of the National Oceanic and Atmospheric Administration (Administration) to accompany fishing vessels “for the purpose of conducting research and observing operations, including collecting information which may be used in civil or criminal penalty proceedings,



forfeiture actions, or permit or certificate sanctions.” 50 C.F.R. § 216.24(f)(1) (1986). In *Balelo*, this court, sitting en banc, held that the Secretary did not exceed the scope of his authority in promulgating this regulation and that the placement of observers aboard the vessels did not constitute an unreasonable warrantless search within the meaning of the fourth amendment. 724 F.2d at 755.

The Administrator's new policy of hiring female, as well as male, observers to accompany selected fishing vessels on their voyages prompted the present litigation. Before 1986, the Administration did not hire women to fill positions as porpoise observers aboard fishing vessels. A number of female applicants complained of discrimination, and the Chief of the Administration's Civil Rights Division conducted an administrative inquiry into the complaints. He concluded that the practice of denying women employment on the tuna vessels \*671 solely because of their sex violated Title VII of the Civil Rights Act of 1964. Pursuant to his recommendation, the Administration began recruiting female as well as male applicants for the tuna boat observer program. Four women were recruited for the observer position in 1986 and were assigned to their first voyages in January of 1987.

In November of 1986, the Administration notified the tuna fleet that women were being trained as observers and that the female observers could be placed aboard the vessels in the near future. The letter sent to each owner stated that no alterations of the vessels or special accommodations

would be required, but that any adjustments that could be made to achieve compatibility between male crew members and female observers were encouraged.

The owners were notified in December 1986 and January 1987 that a female observer would be assigned to accompany their vessels, the M/V Mariner and the M/V Apure, on their next voyages. In two separate actions, the owners and crew filed these actions for declaratory and injunctive relief. In each action, the owners and crew alleged that the Administrator's directive requiring the presence of female observers threatened a violation of the crew members' constitutional privacy rights and a violation of regulations requiring the observer to carry out his duties so as to minimize interference with fishing operations, 50 C.F.R. § 216.24(f)(2) (1986). The owners and crew sought and obtained temporary restraining orders prohibiting the government from implementing its new directive. The owners and crew then moved for preliminary injunctive relief. They supplemented their motions with various declarations describing the living and working conditions on the vessels. We now summarize these declarations.

A fishing voyage may last three months or longer, depending upon fishing conditions. During this period, the crew members work together on the deck of the boat, eat and drink together in the small galley, and are otherwise forced to interact with one another in their bunkrooms, in the passageways, and in the common showers and toilets.

The crew members allegedly enjoy little or no privacy with respect to intimate bodily functions. They share small, dormitory-style bunkrooms and common toilets and showers. Because the bunkrooms are cramped, the crew members usually undress in the common area of the bunkroom, rather than behind curtains in their bunks. Moreover, because the common toilets and showers lack partitions or curtains, they usually bathe and perform other bodily functions in view of their cabinmates. Though single and double cabins equipped with private bathrooms exist on the vessels, these are assigned to officers. Porpoise observers usually bunk with the crews and share their bathroom facilities; thus, these observers may both observe and be observed by the crew members while undressing or performing bodily functions.

In addition, the crew members allegedly expose their bodies to the view of other members of the boat's complement while working on deck. Declarations submitted by the owners and crew state that crew members sometimes remove their clothes on deck, urinate over the side of the deck, shower on deck, and use unenclosed toilets on the deck. The porpoise observer, while conducting observation duties on deck, may have occasion to view these activities as well.

Finally, the declarations state that the West Coast tuna fishing industry has suffered severe financial losses in the past few years. The declarations contend that the presence of a female observer could destroy morale and distract the crew, thus affecting the crew's efficiency and decreasing the vessel's

profits. The declarations also express the owners' concern that the crew members, some of whom are allegedly crude men with little formal education, may harass or sexually assault a female observer. Such tortious conduct could subject the owners to uninsurable liability, and further endanger their profits. To support this allegation, the owners referred to an incident which occurred aboard a foreign \*672 vessel involving an assault by a Korean officer upon an American female who served as a foreign fishing observer. Finally, the owners claimed that officers would have to devote time to protecting the female observer from the crew, thus distracting them from their primary duty of locating and catching tuna.

The owners and crew argued that these declarations were sufficient to call into question the constitutionality of the Administration's order requiring that the owners permit female observers to accompany their vessels on extended fishing voyages. Due to the captains' practice of assigning government observers to bunk in the dormitory bunkrooms and the crew members' habit of undressing, showering, and relieving themselves on deck, the crew members allegedly would be forced to expose their naked bodies to the view of the observer both above and below the deck. They contended further that even if this indignity could be avoided, the female observer's very presence in common areas of the vessel, such as the dining area, would unconstitutionally infringe the crew members' alleged right to privacy in these areas.

The owners also contended that declarations stating that the presence of a female would create conflicts that would disrupt fishing operations raised a serious legal question regarding the legality of assigning females as observers under 50 C.F.R. § 216.24(f) (2) (1986). This regulation requires that the duties of the observer be performed in a manner that minimizes interference with fishing operations. The owners contended that this regulation should be interpreted to require the government to refrain from placing female observers on board vessels because the mere presence of a woman on the ship would distract the crew and affect its efficiency.

The government responded to these averments by submitting declarations challenging the owners' and crew's assertion that an invasion of the crew members' privacy interests was unavoidable and that the female observer would disrupt fishing operations. With respect to the crew members' privacy claim, the government submitted declarations pointing out that Administration regulations do not require that observers be placed in shared bunkrooms, that private quarters on tuna vessels may remain vacant throughout a fishing voyage, and that both male and female observers had been assigned private accommodations on boats in the past. Declarations from both male and female observers stated that crew members were always partially dressed while performing their duties, and that they had never observed crew members taking showers on deck.

With respect to the owners' claim that the presence of a female would disrupt fishing operations and provoke jealousy and fights, the government submitted the declaration of Wendy Townsend, a female Administration observer, who completed a 48-day voyage aboard a tuna seiner, which, like the owners' vessels, is subject to the Administration's directive. She stated that though the vessel's navigator vacated his quarters for the observer's use, he expressed no resentment at her presence and that they established a comfortable working rapport. Townsend also stated that she established amicable relations with the crew members, that no harassment or other disturbing incidents took place during her voyage, and that the crew members succeeded in capturing a hold-full of fish during the voyage.

The government also challenged the owners' prediction that the presence of a female observer would subject the owners to ruinous liability for the tortious conduct of their employees. It relied on Townsend's statement that she experienced no problems with the crew members. The government also submitted the declaration of Janet Wall, a foreign fisheries observer since 1978, who stated that approximately one-third, or about 150, of the observers serving on foreign vessels each year are women, and that in the past ten years there had been only six instances of physical or verbal abuse of female observers on these vessels. Finally, the government contended that the owners and officers, rather than the government, were responsible as a matter of law for the conduct of their \*673 crews, and that the

owners could not be heard to complain of financial injuries which might result from the tortious conduct of their own employees.

The district court granted the motions of the owners and crew for preliminary injunctions in each case. The district court found that the parties raised serious privacy questions, and a serious question concerning the legality of placing women on the vessels under 50 C.F.R. § 216.24(f)(2) (1986). The district court determined that the balance of hardships tipped sharply in favor of the owners and crew. The court decided that the injunction would merely preserve the status quo, and this was important considering “the fact that the tuna industry is not as viable as it once was.” In addition, the court concluded that maintenance of the status quo allowing only male observers “will not adversely effect the purpose of the [Act], namely the preservation of porpoise.”

## II

When reviewing an order issuing a preliminary injunction, an appellate court must determine whether the district court applied the proper legal standard in issuing the injunction and whether it abused its discretion in applying that standard. *Sports Form, Inc. v. United Press International, Inc.*, 686 F.2d 750, 752 (9th Cir.1982) (*Sports Form* ). An injunction may also be set aside if the district court misapprehended the law in its preliminary assessment of the merits, or premised its conclusions on clearly erroneous findings of fact. *Id.* Absent one of these errors, the district court's decision will

not be reversed merely because the appellate court would have arrived at a different result if it had initially applied the law to the facts of the case. *Id.*

Because our review of the district court's decision is generally limited to whether the district court abused its discretion, our disposition of an appeal from a preliminary injunction ordinarily will not dispose of the merits of the litigation. *Id.* at 753. “Because of the limited scope of our review of the law applied by the district court and because the fully developed factual record may be materially different from that initially before the district court, our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits.” *Id.*

In some cases, such appeals unnecessarily delay the litigation and waste judicial resources. *Id.* In this case, for example, the government moved to stay discovery in the underlying litigation pending our disposition of this appeal. To the extent that a desire to get an early glimpse of our view of the merits of the underlying legal issues in this litigation motivated this tactic, it was both misconceived and wasteful. A preliminary injunction is, as its name implies, preliminary to the trial—not to an appeal. We believe that this case could have proceeded to trial, or to the summary judgment stage, in less time than it took the parties to submit these cases for appeal. Had the parties pursued this course, they would have achieved a prompt resolution of the merits. But the parties did not pursue this course; therefore, we are conducting our review on the basis of a

limited record. On the basis of this limited record and the status of the litigation, we may do no more than determine whether the district court abused its discretion in determining that serious legal questions were raised and that the balance of hardships tipped sharply in favor of the owners and crew. Our resolution of these issues will not determine the merits of the underlying legal issues presented in this litigation, and will only temporarily affect the rights of the parties. *Id.* When the district court renders its judgment on the merits of these cases, the losing party may again appeal. *Id.* Thus, rather than delay all proceedings during the pendency of an appeal from an order granting a preliminary injunction, the parties should have sought a rapid resolution of the legal issues presented in this case by moving for summary judgment or proceeding to a trial. Unfortunately, the parties did not take seriously our strong suggestion in *Sports Form*.

### III

We now consider the question whether the district court abused its discretion \*674 in granting the preliminary injunction in this action. Identifying the proper test that should be applied by the district court is not always easy. Our cases have emphasized, however, that when the public interest is involved, it must be a necessary factor in the district court's consideration of whether to grant preliminary injunctive relief. Thus, under the "traditional test" typically used in cases involving the public interest, the district court should consider

(1) the likelihood that the moving party will prevail on the merits, (2) whether the balance of irreparable harm favors the plaintiff, and (3) whether the public interest favors the moving party. *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466, 471 (9th Cir.1986). We have allowed the district court some latitude in assessing the first two factors as it fashions appropriate relief. In some cases, we have stated that a plaintiff may meet its burden by demonstrating a combination of probable success on the merits and a possibility of irreparable injury. *E.g.*, *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir.1980) (*L.A. Coliseum*). At other times, we have stated that where the balance of hardships tips decidedly toward the plaintiff, the district court need not require a robust showing of likelihood of success on the merits, and may grant preliminary injunctive relief if the plaintiff's moving papers raise "serious questions" on the merits. *Id.* at 1201, 1203 & n. 9. This latter formulation is known as the "alternative test." Under either test, however, the district court must consider the public interest as a factor in balancing the hardships when the public interest may be affected. *See id.* at 1200; *see also American Motorcyclist Association v. Watt*, 714 F.2d 962, 967 (9th Cir.1983) (*AMA*).

In the case before us, the district court did not find that the owners and crew were likely to prevail on the merits. Instead, it only considered the seriousness of the questions raised and the balance of the hardships between the parties. After examining the



moving papers, the court concluded that the owners and crew raised serious questions on the merits and that the balance of hardships tipped sharply in their favor. The government urges us to find that the district court erred in each of these determinations. However, we need not reach the question whether the owners and crew raised serious questions on the merits before the district court. Our review of the legal questions, as important as they are, will need to await a trial on the merits of this case and any subsequent appeal. We may properly dispose of the appeal before us by considering whether the district court properly evaluated and weighed the relevant harms in this case.

A.

In his Memorandum Decision, the district judge cited four findings in support of his conclusion that the balance of harm tipped sharply in favor of the owners and crew: (1) the preliminary injunction would do no more than “preserve the status quo”; (2) the tuna industry “has been plagued with financial problems”; (3) the female observer would “disturb the domestic aspect of the tuna seiner”; and (4) the declarations submitted by the owners and crew “speculate that accommodation of a female federal observer may be costly.”

These findings do not support the district court's conclusion that the balance of harm tipped decidedly in favor of the owners and crew. First, and perhaps most important, the owners and crew did not demonstrate, and the district court did not find, that

the alleged harms will be irreparable. At a minimum, a plaintiff seeking preliminary injunctive relief must demonstrate that it will be exposed to irreparable harm. *L.A. Coliseum*, 634 F.2d at 1202–03. Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir.1984). A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief. *L.A. Coliseum*, 634 F.2d at 1201.

\*675 The district court did not require a showing that the harms alleged by the owners and crew were imminent or likely. For example, the district court did not require them to demonstrate that the economic losses they alleged would result from a female observer's presence were likely to occur. Instead, the court merely stated that “the declarations submitted by the [owners] *speculate* that accommodation of a female observer *may be costly*” (emphasis added). Nor do the materials that the owners submitted demonstrate an imminent threat of economic harm. The owners offered no evidence that female porpoise observers would interfere with fishing operations on their vessels. Instead, the owners simply stated that their employees would respond negatively to a female observer and that this subjective response might cost the owners money. The owners also feared that their employees would assault or harass the observer and thereby subject them to an increased risk of liability. Neither of these

allegations suffices to establish an imminent threat of economic injury.

The only evidence submitted to substantiate the owner's prediction that they would incur increased liability for intentional torts were materials describing an assault on an American female foreign fisheries observer by a Korean officer on a Korean ship. The possibility that a female observer aboard one of the owners' vessels would suffer a similar attack at the hands of the owners' employees and thus subject the owners to liability is too remote and speculative to constitute an irreparable injury meriting preliminary injunctive relief.

In *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir.) (*South Lake Tahoe* ), cert. denied, 449 U.S. 1039, 101 S.Ct. 619, 66 L.Ed.2d 502 (1980), we held that council members' fears that enforcing regulations would expose them to civil liability did not give them standing to challenge the regulations. *Id.* at 238–39. We held that because “multiple contingencies” must occur before the alleged injury occurred, the threat of civil liability was only *potential*. We concluded that because there was “no immediate threat of suit nor reason to believe suit [was] inevitable,” the injury the council members alleged was too speculative to constitute an “injury in fact” for standing purposes. *Id.* at 239. See also *O'Shea v. Littleton*, 414 U.S. 488, 497, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974) (*O'Shea* ) (plaintiffs lacked standing to complain of an injury that would occur only “if [they] proceed[ed] to violate an unchallenged law

and if they [were] charged, held to answer, and tried in any proceedings.”).

We find the reasoning of these standing cases persuasive because the issues involved in this claim are similar. The owners claim that their increased exposure to liability constitutes economic injury. This claim appears indistinguishable from those alleged in *South Lake Tahoe* and *O'Shea*. Multiple contingencies must occur before their injuries would ripen into concrete harms. Here, as in *South Lake Tahoe*, there is no threat of suit nor reason to believe suit is inevitable. *Id.* at 239; see also *O'Shea*, 414 U.S. at 498, 94 S.Ct. at 677. In addition, we must assume that the owners and their employees will not willfully violate criminal assault laws or commit intentional torts against the observer. *O'Shea*, 414 U.S. at 497, 94 S.Ct. at 676. Because the threat of civil liability is too attenuated and conjectural to constitute a basis for their standing, *South Lake Tahoe*, 625 F.2d at 239, it follows that this injury is too speculative to constitute an irreparable harm justifying injunctive relief. See *L.A. Coliseum*, 634 F.2d at 1201 (plaintiffs must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief; they need only *allege* such injury to establish their standing).

The owners' and crew's claim that they will catch fewer fish if a woman is on board is similarly unsupported. The only materials submitted to the district court describing the impact of women on fishing operations were declarations the government filed stating that women have



served successfully on numerous voyages on both foreign and American fishing vessels. Subjective apprehensions and unsupported \*676 predictions of revenue loss are not sufficient to satisfy a plaintiff's burden of demonstrating an immediate threat of irreparable harm. See *id.* at 1201–02. Moreover, there was no showing that the threat to the owners' revenues constituted an irreparable injury. No consideration was given to whether any lost revenues might be compensable in a damage award, and thus not irreparable. *Id.* at 1202. Indeed, the district court did not make any finding on whether the alleged threat to the owners' revenues would be irreparable. Therefore, the district court abused its discretion by including the economic harm the owners and crew alleged in its calculus when balancing the hardships alleged by the parties.

## B.

The district court similarly failed to find a threat of immediate, irreparable harm to the privacy interests alleged by the crew. The district court did not find, for example, that the female observer would have to bunk in the crew's quarters or observe their intimate bodily activities. Instead, the district judge stated in conclusory fashion that though a “male federal observer did not disturb the domestic aspect of the tuna seiner, a female would.” It is unclear from this description whether the “harm” the court found consisted of an invasion of any constitutionally protected privacy interests or mere inconvenience to the crew members. Injunctions should not issue “to

restrain an act the injurious consequences of which are merely trifling.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982), quoting *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 302, 20 S.Ct. 628, 630, 44 L.Ed. 777 (1900). If the owners and crew demonstrated only a likelihood that the crew members would be inconvenienced by having to adapt to the presence of a woman, but failed to establish an imminent threat to their privacy interests, the district court abused its discretion by resorting to the extraordinary remedy of enjoining the operation of the governmental program in this case.

The government urges us to find that the owners and crew failed to demonstrate a likelihood that the presence of a female observer would implicate constitutionally protected privacy interests. It points out that the Administration does not require that the federal observer be housed with the crew members and that the crew members' privacy in their bedrooms could be ensured by the simple step of assigning the female observer to a private cabin. It argues further that the crew did not allege, much less demonstrate, that the presence of a female observer in other areas of the ship would implicate any constitutionally protected interest.

We agree with the government that mere allegations of inconvenience will not support the crew members' claim of irreparable injury to their constitutional rights. We will not, however, decide whether the owners and crew have raised serious constitutional issues in this appeal. Because we cannot determine

from the district court's decision whether the district court found that a female observer would infringe any constitutionally protected privacy interests, we need not reach that issue.

### C.

The district court also failed to mention the harm that the government might suffer from a preliminary injunction, and thus did not weigh that harm against any alleged privacy interests of the crew members. The district court must “identify the harms which a preliminary injunction might cause to defendants and ... weigh these against plaintiff's threatened injury.” *L.A. Coliseum*, 634 F.2d at 1203.

The only indication in the district judge's opinion that he considered whether the injunction would harm the government is his statement that the injunction would do no more than preserve the status quo. This brief statement does not identify specific injuries alleged by the government or weigh those injuries against those alleged by the owners and crew. In fact, however, the government did allege that enjoining the placement of female observers on \*677 board the ships would cause specific injuries to governmental interests.

The government alleged that its ability to enforce the mandate of the Act would be hampered if it were prohibited from placing qualified members of the observer program aboard West Coast vessels. It also alleged that its failure to employ women in the

observer program could subject it to liability for a violation of Title VII of the Civil Rights Act of 1964. The district court's decision does not indicate that it considered, much less weighed, this harm against the injuries alleged by the owners and crew. This failure to identify, evaluate, and weigh the potential harm alleged by the government is reversible error. *L.A. Coliseum*, 634 F.2d at 1203.

### D.

Finally, the district court failed to identify and weigh the public interests at stake in its balance of harms analysis. As stated earlier, the district court must always consider whether the public interest would be advanced or impaired by issuance of an injunction in any action in which the public interest is affected. *AMA*, 714 F.2d at 967.

The owners and crew argue that delaying either temporarily or permanently the use of women in the Act's observer program would not have any impact on the interests of the public. This argument rests on two premises: first, that the only public interest implicated by this dispute is the interest in preserving marine mammals, and second, that excluding qualified women from the observer program will not negatively affect that interest. Though the district court's analysis of the balance of harms does not indicate whether it considered or balanced the interests of the public in this case, it appears that the district court accepted the assertion of the owners and crew that excluding women from the observer program would not affect the primary

purpose of the Act. The court stated that “the maintenance of the status quo by allowing exclusively male observers to accompany the plaintiffs' tuna seiners will not adversely affect the purpose of the [Act], namely the preservation of porpoise.”

The argument that the injunction would have no impact on the interests of the public fails to take into account both the government's and the public's interest in ensuring equal employment opportunities for women. This interest, as well as the interest in protecting and preserving marine mammals, is clearly implicated by the issuance of the preliminary injunction in this case. *See, e.g., Kent v. Johnson*, 821 F.2d 1220, 1225 (6th Cir.1987) (operational necessity of nondiscrimination in employment is, by definition, a legitimate penological objective which must be balanced against inmates' alleged rights to privacy); *Forts v. Ward*, 621 F.2d 1210, 1215–17 (2d Cir.1980) (*Forts*) (district court must balance the Title VII rights of guards against the privacy rights of inmates even where no Title VII action has been filed). The district court acknowledged that this action “implicated” the policies underlying Title VII. However, there is no indication that the district court *weighed* the strong governmental and public interest in nondiscriminatory hiring practices by the government against the privacy interests asserted by the crew. This omission fatally undermines the district court's conclusion that the balance of hardships tips decidedly in favor of the owners and crew. *L.A. Coliseum*, 634 F.2d at 1203.

When the governmental and public interest in gender-neutral hiring is balanced against the privacy interests asserted in this case, it is by no means apparent that the balance tips decidedly in the crew members' favor. Some courts have held that the privacy interest in remaining free from involuntary viewing of private parts of the body by members of the opposite sex should not impair employment rights unless the threatened invasion of privacy is serious and there are no means by which both interests can be reasonably accommodated. *See, e.g., Grummett v. Rushen*, 779 F.2d 491, 495 (9th Cir.1985) (restricted observations by members of the opposite sex are not so degrading as to require intervention by a federal court); \*678 *Forts*, 621 F.2d at 1216–17 (threat to privacy must be of sufficient gravity to justify denial of equal employment opportunities); *Smith v. Fairman*, 678 F.2d 52, 54–55 (7th Cir.1982) (per curiam) (conflict between privacy interest of inmates and state's duty to refrain from discrimination in employment of guards ordinarily should be resolved by reasonable accommodations), *cert. denied*, 461 U.S. 907, 103 S.Ct. 1879, 76 L.Ed.2d 810 (1983). Therefore, we cannot automatically say, based on the record before us, that the privacy interests “decidedly” outweigh the important governmental interest in providing equal employment opportunities for its employees, especially if the threat to the privacy interests asserted can be minimized by taking reasonable steps to prevent the threatened intrusions.

In the present case, the district court's decision does not indicate that the court

considered whether less drastic alternatives were available that could accommodate both the crew members' alleged privacy interests and the governmental and public interest in gender-neutral hiring. If such alternatives are available, the crew members' alleged privacy claim may be reduced to no more than a claim of inconvenience. See *Forts*, 621 F.2d at 1217 (interests in style and avoiding discomfort do not justify denial of equal employment opportunities). We therefore cannot determine from the scant record before us what, if any, effect the female observer's presence would have on the crew members' alleged right to be free from involuntary observation of their intimate activities and whether this harm decidedly outweighs the governmental and public interests threatened by the issuance of the preliminary injunction. We trust these issues will be properly developed during the trial.

#### IV

In conclusion, after careful review of the record and the district court's decision, we hold that the district court abused its discretion by ordering preliminary relief in this case. Under the alternate approach articulated in *L.A. Coliseum*, the moving party must first demonstrate an immediate threat of irreparable injury to itself and that the balance of hardships tips decidedly in its favor. *Id.* at 1203. The district court did not determine that the injuries alleged by the owners and crew were serious, immediate, and irreparable. Moreover, it failed to identify the harm which a preliminary injunction might cause to the government, its employees, and the public and to weigh this harm against any irreparable injuries alleged by the owners and crew. We therefore reverse the orders granting preliminary injunctions.

REVERSED.

#### All Citations

844 F.2d 668, 46 Fair Empl.Prac.Cas. (BNA) 1027, 46 Empl. Prac. Dec. P 37,935

**Exhibit RE-LA-4**

 KeyCite Yellow Flag - Negative Treatment

Called into Doubt by [Oracle America, Inc. v. Google LLC](#), Fed.Cir. (Cal.), March 27, 2018

869 F.3d 848

United States Court of Appeals,  
Ninth Circuit.

DISNEY ENTERPRISES, INC.;  
LucasFilm Ltd. LLC; Twentieth Century  
Fox Film Corporation; Warner Brothers  
Entertainment, Inc., Plaintiffs–  
Counter–Defendants–Appellees,  
v.  
[VIDANGEL, INC.](#), Defendant–  
Counter–Claimant–Appellant.

No. 16-56843

|  
Argued and Submitted June  
8, 2017 Pasadena, California

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Filed August 24, 2017

### Synopsis

**Background:** Companies that owned copyrights for movies and television shows brought action against operator of online streaming service that removed objectionable content from movies and television shows, alleging copyright infringement in violation of Copyright Act and circumvention of technological measures controlling access to copyrighted works in violation of Digital Millennium Copyright Act (DMCA). The United States District Court for the Central District of California, No. 2:16-cv-04109-AB-PLA, André Birotte, Jr., J., [224 F.Supp.3d 957](#), granted companies' motion for preliminary injunction. Operator appealed.

**Holdings:** The Court of Appeals, [Hurwitz](#), Circuit Judge, held that:

companies showed likelihood of success on merits of copyright infringement claim;

operator failed to show likelihood of success on Family Movie Act (FMA) defense;

operator failed to show likelihood of success on fair use defense;

companies showed likelihood of success on merits of claim for violation of DMCA;

companies showed likelihood of irreparable harm;

balance of equities supported preliminary injunction; and

public interest supported preliminary injunction.

Affirmed.

**\*851** Appeal from the United States District Court for the Central District of California, André Birotte, Jr., District Judge, Presiding, D.C. No. 2:16-cv-04109-AB-PLA

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Before: [Carlos T. Bea](#) and [Andrew D. Hurwitz](#), Circuit Judges, and [Leslie E. Kobayashi](#),\*\* District Judge.

\*\* The Honorable Leslie E. Kobayashi, United States District Judge for the District of Hawaii, sitting by designation.

## OPINION

[HURWITZ](#), Circuit Judge:

VidAngel, Inc. operates an online streaming service that removes objectionable content from movies and television shows. VidAngel purchases physical discs containing copyrighted movies and television shows, decrypts the discs to “rip” a digital copy to a computer, and then streams to its customers a filtered version of the work.

The district court found that VidAngel had likely violated both the Digital Millennium Copyright Act and the Copyright Act, and preliminarily enjoined VidAngel from circumventing the technological measures controlling access to copyrighted works on DVDs and Blu-ray discs owned by the plaintiff entertainment studios, copying



those works, and streaming, transmitting, or otherwise publicly performing or displaying them electronically. VidAngel's appeal presents two issues of first impression. The first is whether the Family Movie Act of 2005 exempts VidAngel from liability for copyright infringement. 17 U.S.C. § 110(11). The second is whether the anti-circumvention provision of the Digital Millennium Copyright Act covers the plaintiffs' technological protection measures, which control both access to and use of copyrighted works. 17 U.S.C. § 1201(a)(1). The district court resolved these issues against VidAngel. We agree and affirm the preliminary injunction.

## FACTUAL BACKGROUND

### I. The copyrighted works.

Disney Enterprises, LucasFilm Limited, Twentieth Century Fox Film Corporation, \*853 and Warner Brothers Entertainment (“the Studios”) produce and distribute copyrighted motion pictures and television shows. The Studios distribute and license these works for public dissemination through several “distribution channels”: (1) movie theaters; (2) sale or rental of physical discs in DVD or Blu-ray format; (3) sale of digital downloads through online services, such as iTunes or Amazon Video; (4) on-demand rental for short-term viewing through cable and satellite television or internet video-on-demand platforms, such as iTunes or Google Play; and (5) subscription on-demand streaming online outlets, such as Netflix, Hulu, HBO GO, and cable television.

To maximize revenue, the Studios employ “windowing,” releasing their works through distribution channels at different times and prices, based on consumer demand. Typically, new releases are first distributed through digital downloads and physical discs, and are only later available for on-demand streaming. The Studios often negotiate higher licensing fees in exchange for the exclusive rights to perform their works during certain time periods. Digital distribution thus provides a large source of revenue for the Studios.

The Studios employ technological protection measures (“TPMs”) to protect against unauthorized access to and copying of their works. They use Content Scramble System (“CSS”) and Advanced Access Content System (“AACS”), with optional “BD+,” to control access to their copyrighted content on DVDs and Blu-ray discs, respectively. These encryption-based TPMs allow consumers to use players from licensed manufacturers only to lawfully decrypt a disc's content, and then only for playback, not for copying.<sup>1</sup>

<sup>1</sup> Thus, as the licensors of CSS and AACS, amicus curiae DVD Copy Control Association, Inc. and Advanced Access Content System License Administrator, LLC, explain, “[i]ndividual consumers purchasing a DVD or Blu-ray Disc are not provided the keys or other cryptographic secrets that are necessary for playback. They must use a licensed player which, in turn, must abide by the technical specifications and security requirements imposed by [their] licenses.”

### II. VidAngel's streaming service.

VidAngel offers more than 2500 movies and television episodes to its consumers. It purchases multiple authorized DVDs or Blu-ray discs for each title it offers. VidAngel then assigns each disc a unique inventory barcode and stores it in a locked vault. VidAngel uses AnyDVD HD, a software program, to decrypt one disc for each title, removing the CSS, AACS, and BD + TPMs on the disc, and then uploads the digital copy to a computer.<sup>2</sup> Or, to use VidAngel's terminology, the “[m]ovie is ripped from Blu-Ray to the gold master file.” After decryption, VidAngel creates “intermediate” files, converting them to HTTP Live Streaming format and breaking them into segments that can be tagged for over 80 categories of inappropriate content. Once tagged, the segments are encrypted and stored in cloud servers.

<sup>2</sup> AnyDVD HD is sold by RedFox, a Belize-based company run by former employees of a company convicted overseas for trafficking in anti-circumvention technology and identified by the United States Trade Representative as selling software that facilitates copyright violations. AnyDVD is commercially available outside of the United States.

Customers “purchase” a specific physical disc from VidAngel's inventory for \$20. The selected disc is removed from VidAngel's inventory and “ownership” is transferred to the customer's unique user ID. However, VidAngel retains possession of the physical disc “on behalf of the purchasers,” with the exception of the isolated \*854 cases in which the consumer asks for the disc. To date, VidAngel has shipped only four discs to purchasers.

After purchasing a disc, a customer selects at least one type of objectionable content to be filtered out of the work.<sup>3</sup> VidAngel then streams the filtered work to that customer on “any VidAngel-supported device, including Roku, Apple TV, Smart TV, Amazon Fire TV, Android, Chromecast, iPad/iPhone and desktop or laptop computers.” The work is streamed from the filtered segments stored in cloud servers, not from the original discs. Filtered visual segments are “skipped and never streamed to the user.” If the customer desires that only audio content be filtered, VidAngel creates and streams an altered segment that mutes the audio content while leaving the visual content unchanged. VidAngel discards the filtered segments after the customer views them.

<sup>3</sup> VidAngel initially permitted streaming without filters. It then began requiring a filter, but soon discovered customers were selecting inapplicable filters (e.g., a *Star Wars* character for a non-*Star Wars* movie) to obtain unfiltered films. VidAngel subsequently required filtering to correspond to the specific movie being streamed, but permitted the single required filter to be simply for the opening or closing credits. After the Studios brought this action, VidAngel began requiring customers to “pick at least one additional [non-credits] filter.”

After viewing the work, a customer can sell the disc “back to VidAngel for a partial credit of the \$20 purchase price,” less \$1 per night for standard definition purchases or \$2 per night for high-definition purchases. VidAngel accordingly markets itself as a \$1 streaming service. After a disc is sold back to VidAngel, the customer's access to that title is terminated.<sup>4</sup> Virtually all (99.6%) of VidAngel's customers sell back their titles, on average within five hours, and VidAngel's discs are “re-sold and streamed to a new

customer an average of 16 times each in the first four weeks” of a title's release.

- 4 VidAngel previously permitted customers to select “automatic sellback,” but eliminated that feature after this suit was filed.

### III. VidAngel's growth.

In July 2015, VidAngel sent letters to the Studios describing its service. The letters explained that VidAngel was in “a limited beta test of its technology” and had only 4848 users, and concluded: “If you have any questions concerning VidAngel's technology or business model, please feel free to ask. If you disagree with VidAngel's belief that its technology fully complies with the Copyright Act ... please let us know.” The Studios did not respond, but began monitoring VidAngel's activities.

VidAngel opened its service to the general public in August 2015. Its marketing emphasized that it could stream popular new releases that licensed video-on-demand services like Netflix could not, for only \$1. For example, when VidAngel began streaming Disney's *Star Wars: The Force Awakens*, it was available elsewhere only for purchase on DVD or as a digital download, not as a short-term rental. Similarly, VidAngel began streaming Fox's *The Martian* and *Brooklyn* while those works were exclusively licensed to HBO for on-demand streaming. Customers responded favorably.<sup>5</sup> And, a survey indicated that 51% of VidAngel's users would not otherwise \*855 watch their selections without filtering.

- 5 For example, one customer tweeted: “Son asked for #StarWars A New Hope. Not on Netflix, Google play charges \$19.99. Streamed HD on @VidAngel. \$2 & hassle free!” Another gave VidAngel a 5–star rating on Facebook, explaining: “We bought Star Wars and sold it back for a total of \$1 when it was like \$5 to rent on Amazon. So even if you don't need content cleaned, it's a great video service.”

VidAngel eventually reached over 100,000 monthly active users. When the Studios filed this suit in June 2016, VidAngel offered over 80 of the Studios' copyrighted works on its website. VidAngel was not licensed or otherwise authorized to copy, perform, or access any of these works.

### PROCEDURAL BACKGROUND

The Studios' complaint alleged copyright infringement in violation of 17 U.S.C. § 106(1), (4), and circumvention of technological measures controlling access to copyrighted works in violation of the Digital Millennium Copyright Act of 1998 (“DMCA”), 17 U.S.C. § 1201(a)(1)(A). VidAngel denied the statutory violations, raising the affirmative defenses of fair use and legal authorization by the Family Movie Act of 2005 (“FMA”), 17 U.S.C. § 110(11). The Studios moved for a preliminary injunction, and after expedited discovery, the district court granted the motion.

The district court found that the Studios had demonstrated a likelihood of success on the merits of both their DMCA and copyright infringement claims. It first found that VidAngel violated § 1201(a)(1)(A) of the DMCA by circumventing the technological measures controlling access to the Studios'

works. The district court also concluded that VidAngel violated the Studios' exclusive right to reproduce their works under § 106(1) by making copies of them on a computer and third-party servers. It also held that VidAngel violated the Studios' exclusive right to publicly perform their works under § 106(4), because at most the customers “own” only the physical discs they “purchase,” not the digital content streamed to them.

The district court rejected VidAngel's FMA defense, holding that “VidAngel's service does not comply with the express language of the FMA,” which requires a filtered transmission to “come from an ‘authorized copy’ of the motion picture.” § 110(11). The district court also found that VidAngel was not likely to succeed on its fair use defense, emphasizing that the “purpose and character of the use” and “effect of the use upon the potential market for or value of the copyrighted work” factors weighed in favor of the Studios. 17 U.S.C. § 107.

The district court concluded that the Studios had demonstrated a likelihood of irreparable injury from VidAngel's interference “with their basic right to control how, when and through which channels consumers can view their copyrighted works” and with their “relationships and goodwill with authorized distributors.” Finally, the court found that “the balance of hardships tips sharply in [the Studios'] favor.”

The court therefore preliminarily enjoined VidAngel from copying and “streaming, transmitting, or otherwise publicly performing or displaying any of Plaintiff's

copyrighted works,” “circumventing technological measures protecting Plaintiff's copyrighted works,” or “engaging in any other activity that violates, directly or indirectly,” 17 U.S.C. §§ 1201(a) or 106. VidAngel timely appealed.<sup>6</sup>

<sup>6</sup> Both the district court and this court denied VidAngel's motions for a stay of the preliminary injunction. Before its motions were denied, VidAngel continued to stream the Studios' copyrighted works and added at least three additional works to its inventory. The district court held VidAngel in contempt for violating the preliminary injunction. The contempt citation is not involved in this appeal.

## \*856 JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction of this appeal under 28 U.S.C. § 1292(a)(1) and review the district court's entry of a preliminary injunction for abuse of discretion. *Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015) (en banc). “Because our review is deferential, we will not reverse the district court where it got the law right, even if we would have arrived at a different result, so long as the district court did not clearly err in its factual determinations.” *Id.* (citation omitted, alteration incorporated); see also *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (per curiam) (asking whether the district court “identified the correct legal rule” and whether its application of that rule “was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record” (citation omitted)).



## DISCUSSION

A party can obtain a preliminary injunction by showing that (1) it is “likely to succeed on the merits,” (2) it is “likely to suffer irreparable harm in the absence of preliminary relief,” (3) “the balance of equities tips in [its] favor,” and (4) “an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). A preliminary injunction may also be appropriate if a movant raises “serious questions going to the merits” and the “balance of hardships ... tips sharply towards” it, as long as the second and third *Winter* factors are satisfied. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). The district court applied both of these standards.

### I. Likelihood of success on the merits.

Likelihood of success on the merits “is the most important” *Winter* factor; if a movant fails to meet this “threshold inquiry,” the court need not consider the other factors, *Garcia*, 786 F.3d at 740, in the absence of “serious questions going to the merits,” *All. for the Wild Rockies*, 632 F.3d at 1134–35. However, “once the moving party has carried its burden of showing a likelihood of success on the merits, the burden shifts to the non-moving party to show a likelihood that its affirmative defense will succeed.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007). Thus, if the Studios demonstrated a likelihood of success on their copyright infringement and DMCA claims,

the burden shifted to VidAngel to show a likelihood of success on its FMA and fair use affirmative defenses. *Id.*

### A. Copyright infringement.

To establish direct copyright infringement, the Studios must (1) “show ownership of the allegedly infringed material” and (2) “demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106.” *Id.* at 1159 (citation omitted). VidAngel's briefing on appeal does not contest the Studios' ownership of the copyrights, instead focusing only on the second requirement.

Copyright owners have the exclusive right “to reproduce the copyrighted work in copies,” or to authorize another to do so. 17 U.S.C. § 106(1). VidAngel concedes that it copies the Studios' works from discs onto a computer. VidAngel initially argued that because it lawfully purchased the discs, it can also lawfully re-sell or rent them. But, lawful owners “of a particular copy” of a copyrighted work are only entitled to “sell or otherwise dispose of the possession of that copy,” not to reproduce the work. 17 U.S.C. § 109(a). The district court thus did not abuse its discretion in \*857 concluding that VidAngel's copying infringed the Studios' exclusive reproduction right. *See MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (transferring digital files “from a permanent storage device to a computer's RAM” is “copying” under § 106); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1518 (9th Cir. 1993) (holding that § 106

“unambiguously ... proscribes ‘intermediate copying’ ” (citation omitted).<sup>7</sup>

<sup>7</sup> Indeed, at oral argument, VidAngel conceded that it relies entirely on the FMA and fair use as affirmative defenses to the reproduction claim.

## B. Defenses to copyright infringement.

### 1. The Family Movie Act.

The FMA was designed to allow consumers to skip objectionable audio and video content in motion pictures without committing copyright infringement. Family Entertainment and Copyright Act of 2005, [Pub. L. No. 109–9, Title II, §§ 201, 202\(a\)](#), 119 Stat. 218 (2005). The statute provides, in relevant part:

Notwithstanding the provisions of [section 106](#), the following are not infringements of copyright:

[...]

the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing, from an authorized copy of the motion picture, or the creation or provision of a computer program or other technology that enables such making imperceptible and that is designed and marketed to be used, at the direction of a member of a private household, for such making imperceptible, if no fixed copy of the altered version of the motion picture is

created by such computer program or other technology.

### 17 U.S.C. § 110(11).

We have had no previous occasion to interpret the FMA, so we begin with its text. See [Hernandez v. Williams, Zinman & Parham PC](#), 829 F.3d 1068, 1072 (9th Cir. 2016). The statute clearly identifies two acts that “are not infringements of copyright.” § 110(11). First, it authorizes “making imperceptible”—filtering—by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during performances or transmissions to private households, “from an authorized copy of the motion picture.” *Id.* Second, the statute authorizes the creation or distribution of any technology that enables the filtering described in the first provision and that is designed and marketed to be used, at the direction of a member of a private household, for that filtering, if no fixed copy of the altered version of the motion picture is created by the technology. *Id.* Thus, the second act authorized by the FMA—the creation or distribution of certain technology that enables “such” filtering—necessarily requires that the filtering be “from an authorized copy of the motion picture.” *Id.*

Indeed, VidAngel concedes that under the FMA, “the filtering must come ‘from an authorized copy’ of the movie.” But, VidAngel argues that because it “*begins* its filtering process with an authorized copy”—a lawfully purchased disc—“any

subsequent filtered stream” is also “from” that authorized copy.

We disagree. The FMA permits “the making imperceptible ... of limited portions of audio or video content of a motion picture, during a performance in or transmitted to [a private household], *from* an \*858 authorized copy of the motion picture.” § 110(11) (emphasis added). It does not say, as VidAngel would have us read the statute, “beginning from” or “indirectly from” an authorized copy. *See id.* VidAngel “would have us read an absent word into the statute,” but, “[w]ith a plain, nonabsurd meaning in view, we need not proceed in this way.” *Lamie v. U.S. Tr.*, 540 U.S. 526, 538, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). Rather, the most natural reading of the statute is that the filtered performance or transmission itself must be “from” an authorized copy of the motion picture. *See Yates v. United States*, —U.S. —, 135 S.Ct. 1074, 1085, 191 L.Ed.2d 64 (2015) (plurality opinion) (“The words immediately surrounding [‘from’ in § 110(11)] ... cabin the contextual meaning of that term.”); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 148–49 (2012) (explaining that a “postpositive modifier”—that is, one “positioned after” multiple phrases or clauses, such as “from an authorized copy” here—modifies all the preceding clauses, unless a “determiner” is repeated earlier in the sentence).<sup>8</sup>

<sup>8</sup> In support of its argument that the transmission need only be the culmination of a process that begins with the possession of an authorized copy, VidAngel offers the following analogy: “Holiday cards are best described as coming from loved ones, even

though the mailman serves as an intermediary. Only a hypertechnical interpretation would insist the card came from the mailman.” But, VidAngel is not a mailman who simply delivers movies from the seller to the customer in their original form—it delivers digital, altered copies of the original works, not the discs. Moreover, if we adopted VidAngel’s reading of “from,” the card would be “from” Hallmark, the card creator, not the loved one.

The statutory context of § 110(11) supports this interpretation. *See Yates*, 135 S.Ct. at 1081–82 (noting that the interpretation of statutory language is “determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole” (citation omitted, alterations incorporated)). The FMA was enacted as part of Title II of the Family Entertainment and Copyright Act of 2005, which is entitled “exemption from infringement for skipping audio and video content in motion pictures.” Pub. L. No. 109–9, § 202(a), 119 Stat. 218. It is found in a subsection of 17 U.S.C. § 110, which is entitled “Limitations on exclusive rights: Exemption of certain performances and displays.” These headings indicate that the FMA exempts compliant filtered performances, rather than the processes that make such performances possible. *See Yates*, 135 S.Ct. at 1083 (looking to statute heading to “supply cues” of Congress’s intent). Indeed, the title of § 110 indicates that it is directed only at “certain performances and displays” that would otherwise infringe a copyright holder’s exclusive public performance and display rights, *see* 17 U.S.C. § 106(4), (5), (6), while other limitations on exclusive rights in Title 17 are directed at the reproduction right. *Compare* § 110 with § 108 (“Limitations on



exclusive rights: Reproduction by libraries and archives”).

Moreover, the enacting statute was created “to provide for the protection of intellectual property rights.” [Pub. L. No. 109–9, 119 Stat. 218](#). Notably, the FMA concludes by noting: “Nothing in paragraph (11) shall be construed to imply further rights under [section 106](#) of this title, or to have any effect on defenses or limitations on rights granted under any other section of this title or under any other paragraph of this section.” [§ 110](#). VidAngel's interpretation of the statute—which permits **\*859** unlawful decryption and copying prior to filtering—would not preserve “protection of intellectual property rights” or not “have any effect” on the existing copyright scheme. *See* [Yates, 135 S.Ct. at 1083](#) (explaining that “[i]f Congress indeed meant to make” a statute “an all-encompassing” exemption, “one would have expected a clearer indication of that intent”).

VidAngel argues that the FMA was crafted “to avoid turning on the technical details of any given filtering technology,” citing the statutory authorization of “the creation or provision of ... other technology that enables such making imperceptible.” [§ 110\(11\)](#).<sup>9</sup> But, the phrase “such making imperceptible” clearly refers to the earlier description of “making imperceptible,” which must be “from an authorized copy of the motion picture.” [§ 110\(11\)](#). Thus, even if VidAngel employs technology that enables filtering, the FMA exempts that service from the copyright laws only if the filtering is from an authorized copy of the motion picture. VidAngel's interpretation, which ignores

“intermediate steps” as long as the initial step came from a legally purchased title and the final result involves “no fixed copy of the altered version,” ignores this textual limitation.<sup>10</sup>

<sup>9</sup> Because this argument was not raised below, we would be hard-pressed to find that the district court abused its discretion by failing to address it. We address it nonetheless.

<sup>10</sup> At oral argument, VidAngel asserted that the FMA's prohibition on creating a “fixed copy of the altered version” contemplates that fixed copies of the authorized copy can be made. We disagree. The FMA states only that, when streaming from an authorized copy, “the altered version of the motion picture” created by the filtering technology cannot be fixed in a copy. [§ 110\(11\)](#).

More importantly, VidAngel's interpretation would create a giant loophole in copyright law, sanctioning infringement so long as it filters some content and a copy of the work was lawfully purchased at some point. But, virtually all piracy of movies originates in some way from a legitimate copy. If the mere purchase of an authorized copy alone precluded infringement liability under the FMA, the statute would severely erode the commercial value of the public performance right in the digital context, permitting, for example, unlicensed streams which filter out only a movie's credits. *See* [4 Patry on Copyright § 14:2 \(2017\)](#). It is quite unlikely that Congress contemplated such a result in a statute that is expressly designed not to affect a copyright owner's [§ 106](#) rights. [§ 110](#). *See* [Hernandez, 829 F.3d at 1075](#) (adopting an interpretation because it “is the only one that is consistent with the rest of the statutory text and that avoids creating substantial loopholes ...

that otherwise would undermine the very protections the statute provides”).

And, although we need not rely upon legislative history, it supports our conclusion. The FMA's sponsor, Senator Orrin Hatch, stated that the Act “should be narrowly construed” to avoid “impacting established doctrines of copyright” law and “sets forth a number of conditions to ensure that it achieves its intended effect.” 151 Cong. Rec. S450–01, S501 (daily ed. Jan. 25, 2005). Thus, “an infringing performance ... or an infringing transmission ... are not rendered non-infringing by section 110(11) by virtue of the fact that limited portions of audio or video content of the motion picture being performed are made imperceptible during such performance or transmission in a manner consistent with that section.” *Id.* Indeed, Senator Hatch stressed that “[a]ny suggestion that support for the exercise of viewer choice in modifying their viewing experience of copyrighted works requires violation of either the copyright in the work or of the \*860 copy protection schemes that provide protection for such work should be rejected as counter to legislative intent or technological necessity.” *Id.*

Senator Hatch identified “the Clear Play model” as one intended to be protected by the FMA. *Id.* So did the House of Representatives. H.R. Rep. No. 109–33, pt. 1, at 70 (2005) (minority views); *Derivative Rights, Moral Rights, and Movie Filtering Technology: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. (2004) (ClearPlay CEO testimony).<sup>11</sup>

ClearPlay sells a fast-forwarding device which uses video time codes to permit customers to skip specific scenes or mute specific audio; it does not make copies of the films because the time codes are “integrated” into the disc's encrypted content and players licensed to decrypt and play the content. Not surprisingly, therefore, the only other court to construe the FMA has held that ClearPlay's technology “is consistent with the statutory definition,” *Huntsman v. Soderbergh*, No. Civ.A02CV01662RPMMJW, 2005 WL 1993421, at \*1 (D. Colo. Aug. 17, 2005), but that a filtering technology that made digital copies from lawfully purchased discs and then filtered them, as VidAngel does, is not, *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F.Supp.2d 1236, 1238, 1240 (D. Colo. 2006).

<sup>11</sup> Indeed, the legislative history stresses that the FMA was a response to litigation between ClearPlay and several studios. 150 Cong. Rec. H7654 (daily ed. Sept. 28, 2004) (statement of Rep. Jackson–Lee); see also Family Movie Act of 2004, H.R. Comm. on the Judiciary Rep. No. 108–670 at 41–42 (dissenting views) (opposing the FMA because it “takes sides in a private lawsuit” and “is specifically designed to legalize ClearPlay technology”).

VidAngel does not stream from an authorized copy of the Studios' motion pictures; it streams from the “master file” copy it created by “ripping” the movies from discs after circumventing their TPMs. The district court therefore did not abuse its discretion in concluding that VidAngel is unlikely to succeed on the merits of its FMA defense to the Studios' copyright infringement claims.

## 2. Fair use.

“[T]he fair use of a copyrighted work, including such use by reproduction in copies ... is not an infringement of copyright.” 17 U.S.C. § 107. In determining whether the use of a copyrighted work is fair, we consider:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

*Id.* Although we must consider all of these factors “together, in light of the purposes of copyright,” we are not confined to them; rather, we must conduct a “case-by-case analysis.” *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 577–78, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).

The district court correctly identified the four fair use factors and applied them. VidAngel concedes that the district court correctly found that the second and third factors—“the nature of the copyrighted

work” and “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”—weigh against finding fair use. VidAngel claims, however, that the district court abused its discretion with respect to the first and fourth factors.

\*861 In addressing the first factor, the court asks “whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character ... [;] in other words, whether and to what extent the new work is ‘transformative.’ ” *Id.* at 579, 114 S.Ct. 1164 (citations omitted, alterations incorporated); *see* § 107(1). VidAngel concedes its use is commercial, and thus “presumptively ... unfair.” *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 530 (9th Cir. 2008) (citation omitted). But, it argues that its use is “profoundly transformative” because “omissions can transform a work,” affirming “[r]eligious convictions and parental views.”

The district court found, however, that “VidAngel's service does not add anything to Plaintiff's works. It simply omits portions that viewers find objectionable,” and transmits them for the “same intrinsic entertainment value” as the originals. This factual finding was not clearly erroneous. Although removing objectionable content may permit a viewer to enjoy a film, this does not necessarily “add[ ] something new” or change the “expression, meaning, or message” of the film. *Campbell*, 510 U.S. at 579, 114 S.Ct. 1164. Nor does

reproducing the films' discs in digital streaming format, because “both formats are used for entertainment purposes.” *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003). *Star Wars* is still *Star Wars*, even without Princess Leia's bikini scene.

Moreover, VidAngel's service does not require removing a crucial plot element—it requires the use of only one filter, which can be an audio filter temporarily silencing a portion of a scene without removing imagery, or skipping a gratuitous scene. Indeed, the FMA sanctions only making “limited portions” of a work imperceptible. 17 U.S.C. § 110(11). The district court did not abuse its discretion in finding that VidAngel's use is not transformative. See *Kelly*, 336 F.3d at 819 (“Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium... for entertainment purposes.” (footnote omitted)).

The fourth fair use factor evaluates “the extent of market harm caused by” the infringing activity and “whether unrestricted and widespread conduct of the sort engaged by the defendant ... would result in a substantially adverse impact on the potential market for the original.” *Campbell*, 510 U.S. at 590, 114 S.Ct. 1164 (citation omitted, alteration incorporated); see § 107(4). Because the district court concluded that VidAngel's use was commercial and not transformative, it was not error to presume likely market harm. *Leadsinger*, 512 F.3d at 531.

VidAngel argues that its service actually benefits the Studios because it purchases discs and expands the audience for the copyrighted works to viewers who would not watch without filtering. But, the district court found that “VidAngel's service [is] an effective substitute for Plaintiff's unfiltered works,” because surveys suggested that 49% of its customers would watch the movies without filters. This finding was not clearly erroneous. VidAngel's purchases of discs also do not excuse its infringement. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001) (“Any allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works.”) (quoting *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp.2d 349, 352 (S.D.N.Y. 2000)). And, the market factor is less important when none of the other \*862 factors favor VidAngel. See *Leadsinger*, 512 F.3d at 532.<sup>12</sup>

12 VidAngel also argues that creating an “intermediate copy” for filtering is a “classic fair use.” The cases it cites are inapposite, because VidAngel does not copy the Studios' works to access unprotected functional elements it cannot otherwise access. See *Sega*, 977 F.2d at 1520 (“Where there is good reason for studying or examining the unprotected aspects of a copyrighted computer program, disassembly for purposes of such study or examination constitutes a fair use.”); *Sony Comput. Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 602–07 (9th Cir. 2000) (copying necessary “for the purpose of gaining access to the unprotected elements of Sony's software” was fair use and not a “change of format”).

Finally, VidAngel argues that its service is “a paradigmatic example of fair use: space-shifting.” But, the case it cites states only



that a portable music player that “makes copies in order to render portable, or ‘space-shift,’ those files that already reside on a user’s hard drive” is “consistent with the [Audio Home Recording] Act’s main purpose—the facilitation of personal use.” *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999). The reported decisions unanimously reject the view that space-shifting is fair use under § 107. See *A&M Records*, 239 F.3d at 1019 (rejecting “space shifting” that “simultaneously involve[s] distribution of the copyrighted material to the general public”); *UMG Recordings*, 92 F.Supp.2d at 351 (rejecting “space shift” of CD files to MP3 files as “another way of saying that the unauthorized copies are being retransmitted in another medium—an insufficient basis for any legitimate claim of transformation”). Indeed, in declining to adopt an exemption to the DMCA for space-shifting, see 17 U.S.C. § 1201(a)(1)(C), the Librarian of Congress relied on the Register of Copyright’s conclusion that “the law of fair use, as it stands today, does not sanction broad-based space-shifting or format-shifting.” *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 80 Fed. Reg. 65944–01, 65960 (Oct. 28, 2015) (to be codified at 37 C.F.R. pt. 201). And, even assuming space-shifting could be fair use, VidAngel’s service is not personal and non-commercial space-shifting: it makes illegal copies of pre-selected movies and then sells streams with altered content and in a different format than that in which they were bought.<sup>13</sup>

13 Because the Studios are likely to succeed on the merits of their reproduction claim, and VidAngel is unlikely to succeed on the merits of its affirmative defenses, we therefore need not reach the district court’s alternative § 106 ground for imposing the preliminary injunction—the public performance right. See 17 U.S.C. § 502(a) (authorizing a court to enter a temporary injunction “on such terms as it may deem reasonable to prevent or restrain infringement of copyright”); *Perfect 10*, 508 F.3d at 1159 (holding that plaintiff must show defendant infringed “at least one exclusive right” under § 106); see also *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191, 197 (3d Cir. 2003) (explaining that “for preliminary injunction purposes, [plaintiff] needed to show” only that the defendant’s action “likely violates any provision of § 106,” and the district court’s injunction, based upon likely violations of multiple subsections of § 106, “would not be affected by any conclusion [the appellate court] might make as to whether” defendant’s actions violated a different subsection of § 106). The district court properly enjoined VidAngel from streaming, transmitting, or otherwise publicly performing or displaying any of the Studios’ works, because such actions all stem from either past or future unauthorized copying. See 2 Nimmer on Copyright § 8.02(c) (2017) (“[S]ubject to certain ... exemptions, copyright infringement occurs whenever an unauthorized copy ... is made, even if it is used solely for the private purposes of the reproducer, or even if the other uses are licensed.”); *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 762–63 (7th Cir. 2012) (explaining that “copying videos ... without authorization” constitutes direct infringement and plaintiff would therefore “be entitled to an injunction,” even if the defendant does not “perform” the works itself).

### **\*863 C. Circumvention of access control measures under the Digital Millennium Copyright Act.**

The district court also did not abuse its discretion in finding that the Studios are likely to succeed on their DMCA claim. In relevant part, that statute provides that “[n]o person shall circumvent a technological measure that effectively controls access to a [copyrighted] work.” 17 U.S.C. § 1201(a)(1)(A). Circumvention means “to decrypt

an encrypted work ... without the authority of the copyright owner.” § 1201(a)(3)(A). VidAngel concedes that CSS, AAC3, and BD+ are encryption access controls, and that it “uses software to decrypt” them. But, it argues that, “like all lawful purchasers, VidAngel is *authorized* by the Studios to decrypt [the TPMs] to view the discs’ content.”

The argument fails. Section 1201(a)(3)(A) exempts from circumvention liability only “those whom a copyright owner authorizes to circumvent an access control measure, not those whom a copyright owner authorizes to access the work.” *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 953 n.16 (9th Cir. 2011). *MDY* acknowledged a circuit split between the Second Circuit and the Federal Circuit regarding “the meaning of the phrase ‘without the authority of the copyright owner,’ ” and chose to follow the Second Circuit’s approach in *Universal City Studios, Inc. v. Corley*. *Id.* (citing 273 F.3d 429, 444 (2d Cir. 2001)).<sup>14</sup> *Corley* rejected the very argument VidAngel makes here: “that an individual who buys a DVD has the ‘authority of the copyright owner’ to view the DVD, and therefore is exempted from the DMCA pursuant to subsection 1201(a)(3)(A) when the buyer circumvents an encryption technology in order to view the DVD on a competing platform.” 273 F.3d at 444. Rather, the Second Circuit explained, § 1201(a)(3)(A) “exempts from liability those who would ‘decrypt’ an encrypted DVD with the authority of the copyright owner, not those who would ‘view’ a DVD with the authority of a copyright owner.” *Id.*

14 Although *MDY* and *Corley* involved claims under § 1201(a)(2) rather than § 1201(a)(1), both provisions rely on the definition of circumvention in § 1201(a)(3)(A), so the same analysis applies to claims under both provisions. See *MDY*, 629 F.3d at 953 n.16; *Corley*, 273 F.3d at 444.

Like the defendant in *Corley*, VidAngel “offered no evidence that [the Studios] have either explicitly or implicitly authorized DVD buyers to circumvent encryption technology” to access the digital contents of their discs. *Id.* Rather, lawful purchasers have permission only to view their purchased discs with a DVD or Blu-ray player licensed to decrypt the TPMs. Therefore, VidAngel’s “authorization to circumvent” argument fails.<sup>15</sup>

15 The two Ninth Circuit cases cited by VidAngel in support of its argument interpret different phrases, “without authorization” and “exceeds authorized access,” in a different statute, the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. See *United States v. Nosal*, 676 F.3d 854, 856–63 (9th Cir. 2012) (en banc); *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1132–35 (9th Cir. 2009).

VidAngel also argues, for the first time on appeal, that the TPMs on the Studios’ discs are use controls under § 1201(b) rather than access controls under § 1201(a), and therefore it cannot be held liable for circumventing them. Unlike § 1201(a), § 1201(b) does not prohibit circumvention of technological measures. Rather, it “prohibits trafficking in technologies that circumvent technological measures \*864 that effectively protect ‘a right of a copyright owner,’ ” meaning the “existing exclusive rights under the Copyright Act,” such as reproduction. *MDY*, 629 F.3d at 944 (quoting § 1201(b)(1)). In other words, § 1201(b) governs TPMs that control use of

copyrighted works, while § 1201(a) governs TPMs that control access to copyrighted works. *Id.* at 946 (explaining that DMCA “created a new anticircumvention right in § 1201(a)(2) independent of traditional copyright infringement and granted copyright owners a new weapon against copyright infringement in § 1201(b)(1)”).

But, even assuming that VidAngel's argument is not waived, it fails. VidAngel contends that because the Studios object only to decryption to copy—a *use* of the copyrighted work—but permit those who buy discs to decrypt to view—a way of *accessing* the work—the TPMs are “conditional access controls [that] should be treated as use controls” governed by § 1201(b). VidAngel therefore argues that because it only circumvents use controls, but does not traffic, it does not violate the DMCA. But, the statute does not provide that a TPM cannot serve as both an access control and a use control. Its text does not suggest that a defendant could not violate both § 1201(a)(1)(A), by circumventing an access control measure, and § 106, by, for example, reproducing or publicly performing the accessed work. Indeed, this court has acknowledged that a TPM could “both (1) control[ ] access and (2) protect[ ] against copyright infringement.” *MDY*, 629 F.3d at 946.

To be sure, “unlawful circumvention under § 1201(a)—descrambling a scrambled work and decrypting an encrypted work—are acts that do not necessarily infringe or facilitate infringement of a copyright.” *Id.* at 945.

Thus, a defendant could decrypt the TPMs on the Studios' discs on an unlicensed DVD player, but only then “watch ... without authorization, which is not necessarily an infringement of [the Studios'] exclusive rights under § 106.” *Id.* But, when a defendant decrypts the TPMs and then also reproduces that work, it is liable for both circumvention in violation of § 1201(a)(1)(A) and copyright infringement in violation of § 106(1). *See Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 300 (3d Cir. 2011) (“Thus, for example, if a movie studio encrypts a DVD so that it cannot be copied without special software or hardware, and an individual uses his own software to ‘crack’ the encryption and make copies without permission, the studio may pursue the copier both for simple infringement under the Copyright Act and, separately, for his circumvention of the encryption ... under the DMCA.”).<sup>16</sup>

<sup>16</sup> VidAngel argues that adopting this view would “deepen[ ] a controversial split with the Federal Circuit” regarding whether § 1201(a) requires an “infringement nexus.” *See Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004). But this panel is bound by *MDY*. *See* 629 F.3d at 950. In any event, even assuming a nexus is required for dual access-use controls, VidAngel's circumvention was for an infringing use—to copy.

VidAngel relies heavily on the DMCA's legislative history, which states that “1201(a)(2) and (b)(1) are ‘not interchangeable,’” and that circumvention of a TPM controlling access “is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book.” *MDY*, 629 F.3d at 946–47 (citations omitted). VidAngel argues that it instead was given the key to a locked room and entered the room only to take a photograph of the room's contents.



But, it was never given the “keys” to the discs' contents—only authorized players get those keys. VidAngel's decision to use other software to decrypt \*865 the TPMs to obtain a digital copy of the disc's movie thus is exactly like “breaking into a locked room in order to obtain a copy of a [movie].” *Id.* at 947 (citation omitted). Nothing in the legislative history suggests that VidAngel did not circumvent an access control simply because there are authorized ways to access the Studios' works. *See, e.g.*, WIPO Copyright Treaties Implementation and On-line Copyright Infringement Liability Limitation, H.R. Rep. No. 105–551, pt. 1 at 18 (1998) (presuming that a defendant “obtained authorized access to a copy of a work” before it circumvented the TPMs or circumvented “in order to make fair use of a work”).

Finally, VidAngel contends that a TPM cannot serve as both an access and use control, because that would permit copyright holders to prohibit non-infringing uses of their works. It cites a Final Rule of the Library of Congress stating that “implementation of merged technological measures arguably would undermine Congress's decision to offer disparate treatment for access controls and use controls.” [Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies](#), 65 *Fed. Reg.* 64,556–01, 64,568 (Oct. 27, 2000). But, the Rule also states that “neither the language of [section 1201](#) nor the legislative history addresses the possibility of access controls that also restrict use.” *Id.* And, it concludes that “[it] cannot be presumed that

the drafters of [section 1201\(a\)](#) were unaware of CSS,” which existed “when the DMCA was enacted,” and “it is quite possible that they anticipated that CSS would be” an access control measure despite involving “a merger of access controls and copy controls.” *Id.* at 64,572 n.14.

Because VidAngel decrypts the CSS, AACs, and BD+ access controls on the Studios' discs without authorization, the district court did not abuse its discretion in finding the Studios likely to succeed on their [§ 1201\(a\)\(1\)\(A\)](#) circumvention claim.<sup>17</sup>

<sup>17</sup> VidAngel argued in its briefing that the FMA immunizes it from liability for the DMCA claim, but conceded at oral argument that it is “not arguing that the FMA is a defense to the DMCA claim.” And, although it also claimed a fair use defense, VidAngel did not advance any arguments for why its violation of [§ 1201\(a\)\(1\)\(A\)](#) is a fair use independent of those it advances for its copyright infringement. Thus, even assuming that fair use can be a defense to a [§ 1201\(a\)](#) violation, the defense fails for the same reasons it does for the copyright infringement claim.

## II. Irreparable harm.

A preliminary injunction may issue only upon a showing that “irreparable injury is *likely* in the absence of an injunction.” [Winter](#), 555 U.S. at 22, 129 S.Ct. 365. VidAngel contends that once the district court concluded the Studios were likely to succeed on their copyright infringement claim, it relied on a forbidden presumption of harm rather than “actual evidence.” *See Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011) (per curiam). However, the district court expressly rejected any such presumption, instead extensively

discussing the declaration of Tedd Cittadine, Fox Senior Vice President of Digital Distribution. Crediting this “uncontroverted evidence,” the district court found that the Studios showed “VidAngel's service undermines [their] negotiating position ... and also damages goodwill with licensees,” because it offers the Studios' works during negotiated “exclusivity periods” and because licensees raised concerns about “unlicensed services like VidAngel's.”

VidAngel argues that these harms are “vague and speculative,” but the district court did not abuse its discretion in concluding otherwise. Although Cittadine's \*866 declaration does not state that licensees have specifically complained about VidAngel, it says that licensees complain that “it is difficult to compete with” unlicensed services. The Studios also provided uncontroverted evidence that VidAngel offered *Star Wars: The Force Awakens* before it was available for legal streaming and offered *The Martian* and *Brooklyn* during HBO's exclusive streaming license.

This evidence was sufficient to establish a likelihood of irreparable harm. The district court had substantial evidence before it that VidAngel's service undermines the value of the Studios' copyrighted works, their “windowing” business model, and their goodwill and negotiating leverage with licensees. See, e.g., *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285–86 (2d Cir. 2012) (holding that “streaming copyrighted works without permission,” including at times “earlier ... than scheduled by the programs' copyright

holders or paying” licensees was likely to cause irreparable harm to copyright owners' “negotiating platform and business model”); *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F.Supp.2d 30, 50 (D.D.C. 2013) (rejecting contention that harms to negotiation leverage with licensees were “pure speculation” and noting existence of an uncontroverted “sworn declaration from a senior executive at Fox who states that [licensees] have *already* referenced businesses like [the defendant] in seeking to negotiate lower fees”). And, although VidAngel argues that damages could be calculated based on licensing fees, the district court did not abuse its discretion in concluding that the loss of goodwill, negotiating leverage, and non-monetary terms in the Studios' licenses cannot readily be remedied with damages. See *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013) (“Evidence of loss of control over business reputation and damage to goodwill could constitute irreparable harm.”); *WPIX*, 691 F.3d at 286.

VidAngel also argues that the Studios' delay in suing obviates a claim of irreparable harm. But, “courts are loath to withhold relief solely” because of delay, which “is not particularly probative in the context of ongoing, worsening injuries.” *Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (citation omitted). The district court found that the Studios' “delay in seeking an injunction was reasonable under the circumstances, their alleged harms are ongoing, and will likely only increase absent an injunction.” This finding, based on the Studios' cautious investigation of VidAngel,

their decision to sue only after VidAngel expanded from beta-testing into a real threat, and VidAngel's admission that "it intends to continue to stream [the Studios] works and add other future releases, unless enjoined," was not an abuse of discretion.

### III. Balancing the equities.

Before issuing a preliminary injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24, 129 S.Ct. 365 (citation omitted). VidAngel argues that the district court abused its discretion by failing to consider the harm to its "fledgling business" from an injunction. However, the district court did consider the harm to VidAngel—in both its original order and again in denying a stay—and concluded that "lost profits from an activity which has been shown likely to be infringing ... merit[ ] little equitable consideration." *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995) (citation omitted). VidAngel argues that the district court erred in relying on cases that predate *Winter* and \*867 *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). But, those subsequent cases held only that the district court must balance the harms to both sides before issuing an injunction, *Winter*, 555 U.S. at 24, 129 S.Ct. 365; *eBay Inc.*, 547 U.S. at 391–93, 126 S.Ct. 1837, and do not undermine the long-settled principle that harm caused by illegal conduct does not merit significant equitable protection.

The district court might have provided greater detail in balancing the equities. But,

contrary to VidAngel's assertions, the court did not conclude that the Studios were "automatically" entitled to an injunction once it found that their "copyright [was] infringed." *eBay*, 547 U.S. at 392–93, 126 S.Ct. 1837. Nor did it relegate its "entire discussion" of the required equity balancing to "one ... sentence" without analysis. *Winter*, 555 U.S. at 26, 129 S.Ct. 365. Rather, it concluded that the only harm VidAngel asserted—financial hardship from ceasing infringing activities—did not outweigh the irreparable harm likely to befall the Studios without an injunction. This was not an abuse of discretion. *See All. for the Wild Rockies*, 632 F.3d at 1138.<sup>18</sup>

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Moreover, most of the evidence VidAngel cites to show damage to its business was not submitted to the district court until after the preliminary injunction was issued. *See, e.g.*, Declaration of David Quinto in Support of VidAngel, Inc.'s Opposition to Plaintiffs' *Ex Parte* Application for an Order to Show Cause at 2 ("The parties never briefed or explained ... why it is impossible for VidAngel to comply immediately with the preliminary injunction without ceasing business activities entirely."); Declaration of Neal Harmon in Support of VidAngel, Inc.'s *Ex Parte* Application to Stay Preliminary Injunction Pending Appeal Or, Alternatively, Pending Decision by the Ninth Circuit on Stay Pending Appeal at 5 (declaring that VidAngel can modify its applications by January 2017).

### IV. Public interest.

Finally, the court must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24, 129 S.Ct. 365 (citation omitted). VidAngel argues that the preliminary injunction harms the public's interest in filtering, enshrined in the FMA. But, as the district court recognized, this argument

“relies on VidAngel's characterization of its service as the only filtering service” for streaming digital content. It is undisputed that ClearPlay offers a filtering service to Google Play users, and the district court did not clearly err in finding that other companies could provide something “similar to ClearPlay's.” That VidAngel believes ClearPlay's service is technically inferior to its own does not demonstrate that consumers cannot filter during the pendency of this injunction.

On the other hand, as the district court concluded, “the public has a compelling interest in protecting copyright owners' marketable rights to their work and the economic incentive to continue creating television programming” and motion pictures. *WPIX*, 691 F.3d at 287 (citing *Golan v. Holder*, 565 U.S. 302, 328, 132 S.Ct. 873, 181 L.Ed.2d 835 (2012)). The

Studios own copyrights to some of the world's most popular motion pictures and television shows. In light of the public's clear interest in retaining access to these works, and the ability to do so with filters even while VidAngel's service is unavailable, we conclude that the district court did not abuse its discretion in finding that a preliminary injunction is in the public interest. *Id.* at 288.

## CONCLUSION

The judgment of the district court is **AFFIRMED**.

### All Citations

869 F.3d 848, 2017 Copr.L.Dec. P 31,141, 123 U.S.P.Q.2d 1753, 45 Media L. Rep. 2241, 17 Cal. Daily Op. Serv. 8379, 2017 Daily Journal D.A.R. 8228

**Exhibit RE-LA-5**

662 Fed.Appx. 550

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

IFREEDOM DIRECT CORPORATION,  
a Utah corporation, Plaintiff-Appellant,

v.

Peter MCCORMICK, an Individual;  
Veterans First Real Estate and  
Mortgage Company, a California  
corporation, Defendants-Appellees.

No. 16-55877

|  
Submitted December 5,  
2016 \* Pasadena, California

|  
Filed December 08, 2016

\* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Appeal from the United States District Court for the Central District of California, Josephine L. Staton, District Judge, Presiding. D.C. No. 8:16-cv-00470-JLS-KES

Attorneys and Law Firms

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David A. Gauntlett, Attorney, James A. Lowe, Esquire, Gauntlett & Associates, Irvine, CA, for Defendants-Appellees

Before: PREGERSON, D.W. NELSON, and OWENS, Circuit Judges.

## MEMORANDUM \*\*

\*\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

iFreedom Direct Corporation (iFreedom) appeals the district court's order denying its motion for a preliminary injunction. The district court denied the preliminary injunction because iFreedom failed to show a likelihood of irreparable harm. We have jurisdiction under 28 U.S.C. § 1292(a)(1). Reviewing for abuse of discretion, we affirm. *Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013).

The district court found that iFreedom's ten-month delay in seeking a preliminary injunction undermined its claim of irreparable harm. This finding was not “illogical, implausible, or without support in inferences that may be drawn from the facts in the record.” *Id.* (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)). One could infer from the record that iFreedom was likely to enter the California market around the time it sent



Peter McCormick the cease and desist letter that complained that his use was “likely to lead to confusion among consumers and the public” and also alleged “violation[s] \*551 of state and federal ... trademark law.”

Moreover, the district court did not abuse its discretion when it concluded that the evidence iFreedom submitted to show a likelihood of irreparable harm—primarily the declaration of a mortgage industry

expert—was too speculative. The expert's declaration failed to show that harm is likely to occur or that traditional remedies, like monetary damages, are inadequate. *Id.* at 1250.

**AFFIRMED.**

**All Citations**

662 Fed.Appx. 550

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**Exhibit RE-LA-6**



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Native Ecosystems Council v. Marten](#), D.Mont., August 13, 2018

762 F.2d 1374

United States Court of Appeals,  
Ninth Circuit.

OAKLAND TRIBUNE, INC., a  
corporation, Plaintiff-Appellant,

v.

The CHRONICLE PUBLISHING  
COMPANY, INC., the Hearst  
Corporation, and San Francisco  
Newspaper Printing Company, Inc.,  
corporations, Defendants-Appellees.

No. 84-2535.

Argued and Submitted Jan. 18, 1985.

Decided June 14, 1985.

### Synopsis

Newspaper filed suit alleging attempted monopolization of a newspaper market through the use of exclusive contracts for sale of features. The United States District Court for the Northern District of California, Robert P. Aguilar, J., denied the newspaper's motion for a preliminary injunction, and appeal was taken. The Court of Appeals, Boochever, Circuit Judge, held that the newspaper failed to establish that it would suffer irreparable harm and, therefore, it was not entitled to a preliminary injunction.

Affirmed.

### Attorneys and Law Firms

\*1375 J. Michael Hennigan, Greenberg, Hennigan & Mercer, Beverly Hills, Cal., for plaintiff-appellant.

Mark Tuft, Cooper, White & Cooper, John S. Martel, Farella, Braun & Martel, San Francisco, Cal., for defendants-appellees.

On appeal from the United States District Court for the Northern District of California.

Before FLETCHER, BOOCHEVER and NORRIS, Circuit Judges.

### Opinion

BOOCHEVER, Circuit Judge:

The Oakland Tribune appeals the district court's denial of its motion for a preliminary injunction. Because it has not shown that defendants are causing irreparable injury, the denial is affirmed.

### I. BACKGROUND

Defendant Chronicle Publishing Company ("Chronicle") publishes the morning newspaper *San Francisco Chronicle* which is sold principally in San Francisco and the East Bay. Defendant Chronicle and defendant Hearst Corporation ("Hearst") jointly publish the Sunday Examiner and Chronicle, a Sunday morning paper sold in both places. The joint publication itself is not challenged by plaintiff.

Besides stories written by their own staffs or by wire services, newspapers publish features. These include columns, articles, and cartoons and are generally sold by their creator to a syndicate that resells them to newspapers throughout the nation.

Hearst and Chronicle purchase features for their newspapers. The sales contracts have for many years included exclusivity provisions, which the parties concede are customary in the industry. The provisions forbid the syndicate to sell a feature to any newspaper other than the purchaser within a defined geographic area. The contracts are generally terminable by either party upon thirty days' notice.

Plaintiff (“Tribune”) publishes the *Oakland Tribune*, also sold in San Francisco and the East Bay. In its complaint it sued \*1376 for violation of section 2 of the Sherman Act, alleging that defendants have monopolized the San Francisco market for morning newspapers and have attempted to monopolize the East Bay market for the same product. The Tribune claims that the exclusivity provisions contained in the defendants' features contracts constitute the unlawful means by which they achieved or maintained their monopoly. *See generally United States v. Grinnell Corp.*, 384 U.S. 563, 570–71, 86 S.Ct. 1698, 1703–04, 16 L.Ed.2d 778 (1966).

## II. STANDARD OF REVIEW

Review of a ruling on a motion for a preliminary injunction is “very limited.” *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521, 523 (9th

Cir.1984). The decision to grant or deny is within the discretion of the trial court and will only be reversed if that discretion has been abused or if the decision is based on erroneous legal standards or clearly erroneous findings of fact. *Id.*; *Sports Form, Inc. v. United Press International, Inc.*, 686 F.2d 750, 752 (9th Cir.1982); *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1200 (9th Cir.1980).

## III. DISCUSSION

### 1. Standard For Issuing a Preliminary Injunction

“To obtain a preliminary injunction, a party must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor.” *Apple Computer*, 725 F.2d at 523; *see also Los Angeles Memorial Coliseum*, 634 F.2d at 1200–01. These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *See* 634 F.2d at 1201. Under any formulation of the test, plaintiff must demonstrate that there exists a significant threat of irreparable injury. *See American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir.1985) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969)); *Flynt Distributing Co. v. Harvey*,

734 F.2d 1389, 1394 (9th Cir.1984)). Because the Tribune has not made that minimum showing we need not decide whether it is likely to succeed on the merits.

## 2. Irreparable Injury

Plaintiff initially claims injury because it will lose circulation and revenue, but as plaintiff seems to admit, this involves purely monetary harm measurable in damages.

Plaintiff also asserts that “readers who do not reject the paper but continue to buy it and read it with its deficiencies are provided with a product that cannot effectively deliver a full range of information, features and viewpoints.” This is potentially three separate arguments. First, on its surface, it appears to seek the injunction to prevent harm to plaintiff’s readers. But plaintiff’s reply brief indicates that it does not seek “standing to sue for the intangible losses suffered by its readers.” *Cf. Stein v. United Artists Corp.*, 691 F.2d 885, 896 (9th Cir.1982) (shareholder and creditors of corporation lacked standing to sue where their injuries simply reflected injury to corporation allegedly harmed by antitrust violations); *Meyer Goldberg, Inc. of Lorain v. Goldberg*, 717 F.2d 290, 293–94 (6th Cir.1983) (similar).

Second, plaintiff has a more novel theory. “The ‘business’ of the Tribune is the distribution of information; that business is injured.... No measure of money damages can repair that injury.” No authority is cited for this argument which is not presented in

plaintiff’s brief. We will not consider this novel question on the basis of the record and the arguments presented. *See Thompson v. Commissioner*, 631 F.2d 642, 649 (9th Cir.1980), *cert. denied*, 452 U.S. 961, 101 S.Ct. 3110, 69 L.Ed.2d 972 (1981).

**\*1377** Plaintiff’s third and only colorable argument, then, is that it has suffered the loss of reputation, competitiveness, and goodwill and that these losses cannot be remedied. Assuming that in some cases lost reputation is irreparable, we must determine whether the trial court’s finding is clearly erroneous that no irreparable loss was caused by the exclusivity provisions. Plaintiff has not shown that the decline in its sales is caused by the exclusive feature contracts. In its brief to this court, plaintiff pointed to only two affidavits to demonstrate injury. In the first, Robert Maynard, the principal shareholder of plaintiff’s parent corporation, stated that defendants’ use of exclusivity provisions caused plaintiff’s market share to decrease. In the second, journalism professor Norman Isaacs, previously the editor of an Indiana newspaper, attested that as a general matter, when a newspaper is deprived of popular features, it is placed at a competitive disadvantage; Isaacs also attested that some features under contract to defendants are quite popular.

The weight to be given each of these statements is in the discretion of the trial court. *See, e.g., Skar v. City of Lincoln, Nebraska*, 599 F.2d 253, 259 (8th Cir.1979); *Bracco v. Lackner*, 462 F.Supp. 436, 442 n. 3 (N.D.Cal.1978). Professor Isaacs did not address the particular situation in

issue, and Mr. Maynard provided only conclusory statements and was an interested party. See generally *American Passage*, 750 F.2d at 1473 (discounting probative value of conclusory affidavits by plaintiff's executives); *Los Angeles Memorial Coliseum*, 634 F.2d at 1201–02 (similar).

The court's finding that plaintiff failed to sustain its burden is supported by three other arguments. Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm. *E.g.*, *Lydo Enterprises v. City of Las Vegas*, 745 F.2d 1211, 1213–14 (9th Cir.1984); *GTE Corp. v. Williams*, 731 F.2d 676, 678–79 (10th Cir.1984). Plaintiff's argument that the pendency of the 1984 presidential election made its situation desperate, is now moot. Second, at the hearing, plaintiff's counsel admitted he had no evidence that readers would change allegiance from plaintiff's to defendants' papers because the latter carried *Doonesbury*, the feature identified by plaintiff throughout the proceedings as the most desirable. Third, plaintiff did not show that its circulation losses were attributable to the exclusivity provisions because of defendants' showing that feature contracts are terminable by syndicators upon thirty days' notice and plaintiff's failure to show that it bid to wrest these features from defendant. See generally *American Passage*, 740 F.2d at 1473 (no foreclosure where plaintiff free to “market[ ] its own more attractive exclusive ... package”).

In addition to the affidavits discussed, plaintiff argues that because it is a newspaper, it is susceptible to a “downward

spiral” in which decreasing circulation leads to diminished advertising revenues and vice versa until its editorial voice is snuffed out. Plaintiff also implies that the antitrust laws should especially protect newspapers because of their role in public debate. Of course, neither of these contentions will surmount plaintiff's failure to prove that defendants' allegedly unlawful actions caused its decline in circulation. Moreover, no authority is cited for the second proposition. Nor is any cited for the proposition that in the newspaper industry, decreased circulation is tantamount to irreparable harm. No evidence shows that the Tribune verges on bankruptcy.

Finally, we observe that “the basic function of a preliminary injunction is to preserve the *status quo ante litem* pending a determination of the action on the merits.” *Los Angeles Memorial Coliseum*, 634 F.2d at 1200. It is undisputed that the exclusivity provisions which plaintiff seeks to enjoin have been in effect for a number of years. Where no new harm is imminent, and where no compelling reason is apparent, the district court was not required to issue a preliminary injunction against a practice which has continued unchallenged for several years.

**\*1378** The district court's finding that plaintiff failed to show a significant threat of irreparable injury is not clearly erroneous. Because such a showing is a prerequisite to a preliminary injunction, we need not decide whether plaintiff will eventually prevail in its claims. The denial of the preliminary injunction is



**AFFIRMED.**

**All Citations**

762 F.2d 1374, 1985-2 Trade Cases P 66,650,  
11 Media L. Rep. 2179

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**Exhibit RE-LA-7**

UNDER THE ARBITRATION RULES OF THE UNITED NATIONS  
COMMISSION ON INTERNATIONAL TRADE

IN THE PROCEEDING BETWEEN

SERGEI PAUSHOK  
CJSC GOLDEN EAST COMPANY  
CJSC VOSTOKNEFTEGAZ COMPANY

Claimants

-AND-

THE GOVERNMENT OF MONGOLIA

Respondent

---

ORDER ON INTERIM MEASURES

---

*Members of the Tribunal*

The Honorable Marc Lalonde, P.C., O.C., Q.C. (President)  
Professor Brigitte Stern (Arbitrator)  
Dr. Horacio A. Grigera Naón (Arbitrator)

*Secretary of the Tribunal*

M<sup>e</sup> Lev Alexeev

*For Claimants:*

Mr. George M. von Mehren  
Mr. Stephen P. Anway  
Mr. Rostislav Pekař  
Ms. Irina Golovanova  
Squire, Sanders and Dempsey L.L.P.

*For Respondent:*

Mr. Michael D. Nolan  
Mr. Edward G. Baldwin  
Mr. Frédéric G. Sourgens  
Milbank Tweed Hadley McCloy L.L.P.  
Ms. Tainvankhuu Altangerel  
Ministry of Justice and Home Affairs,  
Mongolia

## I- BACKGROUND AND PROCEDURAL HISTORY

1. On November 30, 2007, Claimants, namely Mr. Sergei Paushok, CJSC Golden East Company ("Golden East") and CJSC Vostokneftegaz Company ("Vostokneftegaz"), issued a Notice of Arbitration against the Government of Mongolia, in accordance with Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules").
2. Mr. Paushok is a national of the Russian Federation, whereas Golden East and Vostokneftegaz are both registered in the Russian Federation.
3. Claimants, directly or indirectly, own 100% of the outstanding shares of KOO Golden East-Mongolia ("GEM"), a gold mining company, and KOO Vostokneftegaz ("Vostokneftegaz-Mongolia"), an oil and gas company. Both GEM and Vostokneftegaz-Mongolia are registered and operating in Mongolia.
4. In their Notice of Arbitration, Claimants alleged that Respondent breached its obligations under the Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Russian Federation and the Government of Mongolia (the "Treaty" or "BIT") by, among others, enacting and enforcing legislation known as the Windfall Profit Tax Law (the "WPT Law") and the 2006 Minerals Law (the "2006 Minerals Law").
5. Under the WPT Law, any gold sales at prices in excess of USD 500 per ounce are subject to tax at the rate of 68% on the amount exceeding USD 500 per ounce.
6. Under the 2006 Minerals Law, the maximum number of foreign nationals employed by a mining company is limited to 10% of its workforce, unless the company pays a penalty equal to ten times the minimum monthly salary for each foreign national it employs.
7. Article 6 of the Treaty allows the investor of a Contracting Party to initiate arbitration against the other Contracting Party pursuant to the UNCITRAL Rules:

*"Disputes between one of the Contracting Parties and an investor of the other Contracting Party, arising in connection with realization of investments, including disputes concerning the amount, terms or method of payment of the compensation, shall, whenever possible, be settled through negotiations.*

*If a dispute cannot be settled in such manner within six months from the moment of its occurrence, it may be referred to*

*(a) a competent court or arbitral tribunal of the Contracting Party in which territory the investments were made;*

*(b) the Arbitration Institute of the Stockholm Chamber of Commerce;*

*(c) an ad hoc arbitral tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)."*

8. In their Notice of Arbitration, Claimants appointed Dr. Horacio A. Grigera Naón as arbitrator.
9. On February 18, 2008, Respondent appointed Professor Brigitte Stern as arbitrator.
10. On March 12, 2008, Arbitrators Stern and Grigera Naón, further to the consultation with counsel to the Parties, appointed the Honorable Marc Lalonde as President of the Tribunal.
11. On March 14, 2008, Claimants submitted to the Tribunal a *Request for Interim Measures including a Temporary Restraining Order Prior to March 24, 2008* (the "Request") pursuant to Articles 15 and 26 of the UNCITRAL Rules.
12. In their Request, Claimants requested an order from the Tribunal directing Respondent during the pendency of the arbitral proceedings:
  - a- To suspend enforcement of the WPT Law, the 2006 Minerals Law, and penalties for alleged late tax payments against GEM;
  - b- To suspend any criminal action against Claimants or their investments and guarantee free movement in and out of Mongolia for GEM's representatives, managers and employees;
  - c- To suspend any other conduct that aggravates the dispute, including, but not limited to, disparagement of Claimants or their investment in the media or unjustified refusal of permission to continue to mine gold in the same way and at the same levels as were approved in 2006 and 2007;
13. Claimants also requested the issuance of a temporary restraining order directing Respondent to refrain from the activities listed in sub-paragraphs (a), (b) and (c) pending the Tribunal's decision on interim measures.
14. The request for the issuance of a temporary restraining order was based on the alleged intention of Respondent to prosecute the enforced collection of taxes and fees disputed in this arbitration with effect on March 24, 2008.
15. Subsequent to the Request, various letters and telephone communications were exchanged between the Parties and the members of the Tribunal, including (i) a letter from Counsel for Respondent dated March 22, 2008 and opposing the issuance of a temporary restraining order and (ii) a telephone conference call between counsel for the Parties and the President of the Tribunal on March 22, 2008.
16. On March 23, 2008, the Tribunal issued the following temporary restraining order:

*"1- Taking into account the undertaking already given, Respondent shall refrain from seizing or obtaining a lien on the assets of Claimants and shall allow Claimants to maintain their ordinary business operations;*

2- Claimants shall immediately sign an undertaking not to move assets out of Mongolia nor to take any action which would alter in any way the ownership and/or financial interests of the Claimants with respect to their assets in Mongolia, without prior notice to and agreement of Respondent;

3- Claimants shall, within seven days, provide Respondent with a complete list of their assets in Mongolia;

4- The issue raised by Respondent of the provision of security by Claimants shall be dealt with at the time of the consideration of the Request for Interim Measures;

5- The briefing schedule for any issue related to Claimants' interim measures application shall be decided in a separate procedural order by the Tribunal, after consultation with the Parties.

*Pending its decision on interim measures, the Tribunal urges the Parties to refrain from any action which could lead to further injury and aggravation of the dispute between the Parties."*

17. On April 18, 2008, an organizational meeting was held at the offices of Stikeman Elliott L.L.P. located at 1155, René-Lévesque Blvd West, 40th floor, Montreal, Québec, Canada. The purpose of this meeting was to establish the terms of reference and to discuss various procedural and logistical issues.
18. In addition to the members of the Tribunal and the Secretary thereof, the following counsel attended that meeting:  
  
Mr. George M. von Mehren (Counsel for Claimants)  
Mr. Stephen P. Anway (Counsel for Claimants)  
Mr. Michael D. Nolan (Counsel for Respondent)  
Mr. Edward G. Baldwin (Counsel for Respondent)
19. Further to the meeting, the contents of which, as per counsel for the Parties' agreement and request, were not transcribed, the Secretary of the Tribunal communicated to counsel for the Parties detailed minutes of the said meeting on April 29, 2008.
20. On April 30, 2008, Respondent submitted its *Opposition* to the Request, arguing that the latter should be dismissed.
21. On the basis of the minutes of the meeting referred to in paragraph 17, counsel for the Parties prepared a draft Procedural Order No. 1 and submitted same for consideration to the Tribunal on May 14, 2008.
22. On May 30, 2008, Claimants submitted their *Reply on Interim Measures*, amending their Request and limiting the relief sought to the extension of the temporary restraining order in an Order on Interim Measures.



23. On June 3, 2008, the President of the Tribunal issued Procedural Order No. 1, which dealt with all the procedural and logistical issues, save the timetable of submissions and hearing for Phase 1 (Jurisdiction/Admissibility and Liability).
24. On June 4, 2008, the President of the Tribunal issued Procedural Order No. 2, which dealt with the timetable for Phase 1.
25. On June 30, 2008, Respondent submitted its *Rejoinder* to the Request, requesting to dismiss the latter or, subsidiarily, to order Claimants to cause GEM to pay Windfall Profit Taxes into an escrow account.
26. On July 1, 2008, Claimants submitted their Statement of Claim, but this submission was not considered by the Tribunal either for the purposes of the hearing on interim measures or for the purpose of the present order on interim measures.
27. On July 2, 2008, a conference call was held between counsel for the Parties and the President of the Tribunal in order to address various organizational and procedural issues in relation to the forthcoming hearing on interim measures.
28. From the date of filing of the Request until the date of the hearing on interim measures, counsel for the Parties addressed numerous letters to the members of the Tribunal with respect to the Request as well as in relation to issues peripheral thereto.
29. On July 8, 2008, a full day hearing on interim measures was held at the offices of Stikeman Elliott L.L.P. located at 1155, René-Lévesque Blvd West, 40th floor, Montreal, Québec, Canada (the "Hearing").
30. In addition to the members of the Tribunal, the Secretary of the Tribunal and the Court Reporter, this Hearing was attended by:

On behalf of the Claimants:

Mr. George M. von Mehren (Counsel for Claimants)  
Mr. Stephen P. Anway (Counsel for Claimants)  
Mr. Rostislav Pekař (Counsel for Claimants)  
Ms. Irina Golovanova (Counsel for Claimants)  
Mr. Trevor Covey (Counsel for Claimants)  
Mr. Sergei Paushok (CJSC Golden East Company, CJSC Vostokneftegaz Company)  
Ms. Yana Ibragimova (CJSC Golden East Company)  
Ms. Marina Spirina (CJSC Golden East Company)

On behalf of the Respondent:

Mr. Michael D. Nolan (Counsel for Respondent)  
Mr. Edward G. Baldwin (Counsel for Respondent)  
Mr. Frédéric G. Sourgens (Counsel for Respondent)  
Ms. Tainvankhuu Altangerel (Ministry of Justice and Home Affairs, Mongolia)

31. At the Hearing, counsel for the Parties presented oral submissions to the Tribunal and Mr. Paushok was heard as a witness and questioned by the Tribunal. Questions from the Tribunal and Mr. Paushok's answers thereto were interpreted by Ms. Golovanova, with occasional assistance from the Secretary of the Tribunal.
32. Verbatim transcripts of the Hearing were produced in English and were concurrently available for viewing throughout the Hearing. Hard and soft copies of the transcripts were distributed to the Tribunal and Parties a few days after the Hearing.
33. Having consulted with counsel for the Parties, the Tribunal decided that post-hearing submissions were not required and took the Request under advisement.

## II- GENERAL COMMENTS

### 1- The applicable rules

34. The Tribunal wishes to point out, first, that this case is taking place under the UNCITRAL Arbitration Rules. The powers of the Tribunal relating to interim (or provisional) measures are set in Articles 15(1), 26(1) and 26(2) of those Rules which provide as follows:

*"Article 15(1):*

*Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.*

*Article 26(1):*

*At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.*

*Article 26(2)*

*Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the cost of such measures."*

35. The Parties have drawn the Tribunal's attention to a number of awards under the ICSID Convention dealing with requests for provisional measures under Article 47 of that Convention and Arbitration Rule 39 under it. Rule 39(1) in particular provides that:

*"At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The*

*request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures."*

36. The Tribunal notes that the wording of Article 26(1) of the UNCITRAL Rules is not the same as under the ICSID Convention; it leaves wider discretion to the Tribunal in the awarding of provisional measures ("*any interim measures it deems necessary in respect of the subject-matter of the dispute*") than under Article 47 of the ICSID Rules ("*provisional measures for the preservation of its rights*").

#### 2- What is the subject-matter of the dispute

37. The subject-matter of the dispute is the validity under the Treaty of the Windfall Profit Tax and of the levying of a fee for the import of foreign workers imposed by Respondent. In their Notice of Arbitration of November 30, 2007, Claimants request declaratory relief based on Articles 3(1) and 4 of the Treaty as well as damages, interest and costs. And, in their Statement of Claim filed on June 27, 2008, Claimants request declaratory relief with regard to those two types of measures as contrary to Articles 2, 3 and 4 of the Treaty; in addition, they claim damages, interest and costs to be determined by the Tribunal.

38. The Parties have spent some considerable time arguing the issue of disputed rights in this case. These matters will be dealt with in the section of this Order dealing with imminent danger of prejudice.

#### 3- Interim measures not to be granted lightly

39. It is not contested that interim measures are extraordinary measures not to be granted lightly, as stated in a number of arbitral awards rendered under various arbitration rules<sup>1</sup>. Even under the discretion granted to the Tribunal under the UNCITRAL Rules, the Tribunal still has to deem those measures urgent and necessary to avoid "irreparable" harm and not only convenient or appropriate.

#### 4- Evidentiary Burden

40. In requests for interim measures, it is incumbent upon Claimants to demonstrate that their request is meeting the standards internationally recognized as pre-conditions for such measures<sup>2</sup>.

41. In the present instance, Claimants submitted as principal evidence the testimony of Mr. Sergei Paushok, the Executive Director of GEM and the indirect owner of 100% of the shares of that company. Respondent argued that the Tribunal should attach no value to what it considers a self-serving statement from a party; it argues in particular that Mr. Paushok's Statement "*merely parrots Claimants' legal argument and conclusions, rather than*

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<sup>1</sup> See for example, *Emilio Agustin Maffezini v. Spain*, ICSID Case No ARB/97/7, IIC 84 (1999), Procedural Order No 2, October 28, 1999.

<sup>2</sup> *Ibid.* at ¶10. See also *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID Case No ARB/06/11, IIC 305 (2007), Decision on provisional measures, August 17, 2007 at ¶90 [*Occidental Petroleum*].

*adducing concrete factual material” and that, as such, it did not provide “evidence of a specificity and concreteness that would allow Mongolia the opportunity of confrontation”<sup>3</sup>.*

42. The Tribunal views the matter somewhat differently. The Witness Statement and the oral testimony (the latter taking place at the instigation of the Tribunal) were made in the form of a solemn declaration and it contains some elements which could be considered as statements of facts and others as legal conclusions. Respondent was given full opportunity to cross-examine Mr. Paushok on his Statement. In many cases, a statement by one of the parties may be of great importance in the analysis of the facts and it is up to the tribunal in each case to attach to such a statement the credibility and relevancy it considers appropriate. In the present instance and at this stage of the proceedings, the Tribunal sees no reason to ignore Mr. Paushok’s Statement and oral testimony.

**5- The specific features of this request**

43. In deciding upon the present request for interim measures, the Tribunal will attach significant importance to the specific features surrounding this particular request which differentiate it from other awards referred to by the Parties. In particular, the Government of Mongolia, while not admitting to any illegality in the measures which have been enacted and which are challenged in this case, has recognized, both in 2007 and 2008, that the WPT Law was not achieving its objectives and should be replaced by a less severe taxation regime. In addition, Respondent appears to wish GEM to continue its operations in Mongolia. Evidence in that regard can be seen from the written undertaking given by the State Secretary of the Minister of Justice and Home Affairs on March 19, 2008, (confirmed at the Hearing by Ms. Taivankhuu Altangerel, of the Ministry of Justice and Home Affairs of Mongolia) that no seizure of or lien on GEM’s assets would take place in connection with this dispute until a final award has been rendered in the present case.

**6- Peripheral issues**

44. Before the Hearing, a considerable exchange of correspondence took place between the Parties and with the Tribunal relating to a number of peripheral issues; all of them were resolved before the Hearing, except for the allegation by Respondent that, by selling gold rather than pledging it, GEM was in breach of the Temporary Restraining Order issued by the Tribunal. On the basis of the evidence submitted to it, the Tribunal has come to the conclusion that, in spite of some understandable concern on the part of Respondent, there was no breach of the TRO by Claimants. The Tribunal will deal with this specific issue for the future in this Order.

**III- THE CRITERIA GUIDING THE TRIBUNAL**

45. It is internationally recognized that five standards have to be met before a tribunal will issue an order in support of interim measures. They are (1) prima facie jurisdiction, (2)

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<sup>3</sup> Mongolia’s Rejoinder to Claimants’ March 14, 2008 Request for Interim Measures, June 30, 2008 at ¶12.

prima facie establishment of the case, (3) urgency, (4) imminent danger of serious prejudice (necessity) and (5) proportionality.

46. In addressing the first two criteria, the Tribunal wishes to make it clear that it does not in any way prejudice the issues of fact or law which may be raised by the Parties during the course of this case concerning the jurisdiction or competence of the Tribunal or the merits of the case.

1- **Prima facie jurisdiction**

47. The International Court of Justice described the interpretation to be given to this standard in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*:

*"(O)n a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection to jurisdiction is well founded, yet it ought not to indicate such measures unless the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the court might be founded;"*<sup>4</sup>

48. The Tribunal is of the view that, in their Notice of Arbitration and their submissions in connection with their Request, Claimants have established such a basis upon which the jurisdiction of the Tribunal might be founded. In particular,
- a- The Treaty (Article 6) provides for UNCITRAL arbitration.
  - b- Until proven otherwise, Mr. Paushok is considered a citizen of Russia and the other two Claimants are considered legal persons constituted in accordance with the laws of Russia.
  - c- GEM appears to meet the definition of investment in Article 1(b) of the Treaty and Claimants appear to be direct or indirect shareholders in GEM and to have a separate claim of their own.
  - d- The dispute relates to investment in Mongolia.
49. Respondent raises two arguments in support of its challenge to the jurisdiction of the Tribunal.
50. The first is to the effect that the six-month amicable dispute resolution period prescribed in Article 6 of the BIT was not abided by Claimants. Article 6 states (in part): *"If a dispute cannot be settled in such a manner within six months of its occurrence, it may be referred to" courts or arbitral institutions specified in that Article.*

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<sup>4</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Provisional Measures, Order of May 10, 1984, [1984] I.C.J. Rep. 169 at ¶24.



51. Respondent argues that Claimants initiated the arbitration on November 30, 2007, a mere month after having sent their formal notice to Respondent of their intent to commence investment arbitration. For their part, Claimants argue that a letter sent to the President of Mongolia by Mr. B.A Igoshin, First Deputy Executive Director of GEM, constituted sufficient notice<sup>5</sup>, an argument with which Respondent disagrees.
52. The Tribunal is not ruling at this stage on these arguments, as it believes that they are more matters to be considered as part of the jurisdictional and merits phase of these proceedings. The Tribunal notes however that in the *Lauder v. The Czech Republic* case<sup>6</sup>, an arbitral tribunal ruled that the requirement for a six-month waiting period was not a jurisdictional provision and that other tribunals also ruled that the waiting period need not have lapsed before initiating an arbitration, if negotiation attempts were clearly futile<sup>7</sup>.
53. Respondent's second argument relates to estoppel allegedly resulting from negotiations surrounding Respondent's agreement, in January 2007, to grant to GEM an extension for the payment of the Windfall Profit Tax. This is even more clearly a matter that should be the subject of debate at the time of the jurisdictional and merits phase of these proceedings. It is clearly a contested matter about which both written and oral evidence will be required and it would be premature to embark on such an expedition at the stage of a request for interim measures, where the Tribunal only needs to decide whether there is prima facie jurisdiction.
54. The Tribunal therefore concludes that, for the purpose of a request for interim measures, the prima facie jurisdiction of the Tribunal has been established.

## 2- Prima facie establishment of the case

55. At this stage, the Tribunal need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants. Essentially, the Tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal<sup>8</sup>. To do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures.

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<sup>5</sup> Claimants' Reply on Interim Measures, March 30, 2008, CE-46.

<sup>6</sup> Ad hoc - UNCITRAL Arbitration Rules, IIC 205 (2001), Final Award, September 3, 2001 at ¶187.

<sup>7</sup> *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, July 12, 2006 at ¶32; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, August 6, 2003 at ¶187; *Ethyl Corporation v. Government of Canada*, NAFTA/UNCITRAL Case, Award on Jurisdiction, June 24, 1998 at ¶84.

<sup>8</sup> *Victor Pey Casado, Président Allende Fondation c. République du Chili*, ICSID Case No. ARB/98/2, ICC 185 (2001), Decision on Provisional Measures, September 25, 2001 at ¶8; *Application of the Convention on the Punishment of the Crime of Genocide*, Provisional Measures, Order of September 13, 1993, [1993] I.C.J. Rep. 325 at ¶24.



56. In the present circumstances, the Tribunal concludes that Claimants have succeeded in a prima facie establishment of the case. In so ruling, the Tribunal wishes to stress that in no way does that ruling imply that the Tribunal would reach a similar conclusion on the merits of the case, once it has received submissions and heard witnesses and experts from each side on their respective allegations.

### 3- Urgency

57. From the evidence submitted, it appears that the WPT Law has had a major negative impact on the gold mining industry in Mongolia. Ms. S. Oyun, the President of the Mongolian Geologists Association and a Member of the Mongolian Parliament declared in September 2007 that, subsequently to the adoption of that Law, some 93 gold mining companies discontinued their operations, most of them declaring bankruptcy<sup>9</sup>. This would represent a reduction by more than 50% of the previous number of firms in the industry.

58. The Government of Mongolia itself recognized the critical situation resulting from its legislation and proposed in 2007 major amendments which it did not succeed in getting enacted. And, according to information transmitted to the press service of the Mongolian Government and contained in an undated press release submitted to the Tribunal<sup>10</sup>, the Government decided on May 7, 2008, to propose to Parliament a new law reducing very substantially the tax rates established under the WPT Law. As an explanation, the Government said that the changes were proposed "*(w)ith the purpose of easing the tax burden on the mining companies, increasing the amount of gold deliveries and consolidating all of the tax payment on sold gold and gold-related royalties in the national budget and harmonizing the royalty payments with the international standards*"<sup>11</sup>. The use of the expression "standards" and its interpretation by Claimants were contested by Respondent, but, even accepting Respondent's translation of the appropriate Mongolian word into English, it is clear that the Mongolian Government has realized for quite some time that its taxation regime had led its gold mining industry into a crisis.

59. The Tribunal is not called upon to rule on that overall situation but taking cognizance of it helps the Tribunal in understanding whether the condition of urgency alleged by Claimants can be met in the present case.

60. From the evidence submitted by the Parties and taking into account the very specific features of this case, it appears to the Tribunal that urgent action in the form of interim measures is justified.

61. Respondent claims that over US\$41 million is currently owed by GEM, under the WPT Law. It appears from the financial statements and taxation reports submitted to the Tribunal that GEM could not proceed to the immediate payment of this total sum out of its own resources. The only alternatives would be either loans from financial institutions or a large equity infusion by shareholders. It has been established to the satisfaction of

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<sup>9</sup> Interview published in *Mongolya Segodnya* on September 15, 2007, CE-54.

<sup>10</sup> CE-30.

<sup>11</sup> *Idem*.

the Tribunal that, in the current fiscal conditions, no financial institution would consider lending such an amount of money to GEM. And, assuming that Respondent is right in stating that GEM's net book value assets are worth less than 50% of the amount of WPT owing and the possibility that the Mongolian Parliament would again refuse to amend the WPT Law, it would be very presumptuous for any investor to make additional equity investment in that company. The likelihood of GEM's bankruptcy in such a context therefore becomes very real.

62. The Tribunal is aware of preceding awards concluding that even the possible aggravation of a debt of a claimant did not ("generally" says the *City Oriente* case cited below) open the door to interim measures when, as in this case, the damages suffered could be the subject of monetary compensation, on the basis that no irreparable harm would have been caused<sup>12</sup>. And, were it not for the specific characteristics of this case, the Tribunal might have reached the same conclusion, although it might have expressed reservations about the concept that the possibility of monetary compensation is always sufficient to bar any request for interim measures under the UNCITRAL Rules. But those specific features point not only to the urgency of action by the Tribunal but also to the necessity of such action in the face of an imminent danger of serious prejudice.

#### 4- Imminent danger of serious prejudice (necessity)

63. The Parties have raised a number of arguments in relation to the issue of disputed rights in this case.
64. Respondent, citing ICSID awards, contends that provisional measures are limited to situations where specific performance is requested and that such a request for specific performance could only occur when the dispute is based on a contractual relationship. Respondent further argues that when the dispute only relates to a claim for damages, as in this case, there is no place for provisional measures, as damages can always be compensated with the payment of money. Moreover, says Respondent, the only remedy available under Article 6 the BIT is monetary compensation.
65. Respondent refers in particular to the following cases. In *Occidental Petroleum*, the Tribunal says that "*provisional measures should only be granted in situations of necessity and urgency in order to protect legal rights that could, absent such measures, be definitely lost*" and in paragraph 98, it adds: "*The harm in this case is only "more damages", and this is harm of a type which can be compensated by monetary compensation, so there is neither necessity nor urgency to grant a provisional measure to prevent such harm*"<sup>13</sup>. Respondent also refers to the Decision on revocation of provisional measures in *City Oriente* where the Tribunal states that "*a possible aggravation of a debt does not generally warrant the ordering of provisional measures*"<sup>14</sup>. Respondent also relies on *Plama Consortium Limited v. Bulgaria* where the

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<sup>12</sup> *Plama Consortium Limited v. Bulgaria*, ICSID Case No ARB/03/24, IIC 190 (2005), Order, September 6, 2005 at ¶46 [*Plama*]; *Occidental Petroleum*, *supra* note 2 at ¶99; *City Oriente Limited v. Ecuador*, ICSID Case No. ARB/06/21, IIC 325 (2008), Decision on Revocation of Provisional Measures, May 13, 2008 at ¶64 [*City Oriente*].

<sup>13</sup> *Occidental Petroleum*, *supra* note 2 at ¶59 and ¶98.

<sup>14</sup> *City Oriente*, *supra* note 12 at ¶64.

Tribunal says that “(t)he Tribunal accepts Respondent’s argument that harm is not irreparable if it can be compensated for by damages, which is the case in the present arbitration and which, moreover is the only remedy Claimant seeks”<sup>15</sup>.

66. Claimants, for their part, argue that their right to interim measures is not excluded in the case of a claim for damages only and that, in any event, their request for relief is not only for damages but also for declaratory relief under the provisions of the Treaty.
67. They refer in particular to the *Behring International, Inc. v. Islamic Republic Iranian Air Force* case where the Iran-U.S. Claims Tribunal states that “the concept of irreparable prejudice in international law arguably is broader than the Anglo-American concept of irreparable injury. While the latter formulation requires a showing that the injury complained of is not remediable by an award of damages (...), the former does not necessarily so require”<sup>16</sup>. Claimants also mention *Saipem S.p.A v. The People’s Republic of Bangladesh* where the Tribunal found that Saipem was facing a risk of irreparable damage if it had to pay the amount of a bond<sup>17</sup>.
68. The Tribunal does not agree with Respondent that Claimants are merely requesting damages, as is clearly demonstrated by the text of their request for relief. Moreover, the possibility of monetary compensation does not necessarily eliminate the possible need for interim measures. The Tribunal relies on the opinion of the Iran-U.S. Claims Tribunal in the *Behring* case to the effect that, in international law, the concept of “irreparable prejudice” does not necessarily require that the injury complained of be not remediable by an award of damages. To quote K.P. Berger who refers specifically to Article 26 of the UNCITRAL Rules:

*“To preserve the legitimate rights of the requesting party, the measures must be “necessary”. This requirement is satisfied if the delay in the adjudication of the main claim caused by the arbitral proceedings would lead to a “substantial” (but not necessarily “irreparable” as known in common law doctrine) prejudice for the requesting party.”*<sup>18</sup>

69. The Tribunal shares that view and considers that the “irreparable harm” in international law has a flexible meaning. It is noteworthy in that respect that the UNCITRAL Model Law in its Article 17A does not require the requesting party to demonstrate irreparable harm but merely that “(h)arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted”.

<sup>15</sup> *Plama*, *supra* note 12 at ¶46.

<sup>16</sup> *Behring International, Inc. v. Islamic Republic Iranian Air Force, Iran Aircraft Industries, and The Government of Iran*, Award No. ITM/ITL 52-382-3, June 21, 1985, 8 Iran-U.S. C.T.R. 238 at p. 276.

<sup>17</sup> ICSID Case No. ARB/05/07, ICC 280 (2007), Decision on Jurisdiction and Recommendation of Provisional Measures, March 21, 2007 at ¶182.

<sup>18</sup> Berger, K.P., *International Economic Arbitration*, in *Studies in Transnational Economic Law*, vol. 9, Kluwer Law and Taxation Publishers, Deventer, Boston, 1993 at p. 336.

70. Whatever the situation under the ICSID Convention, the Tribunal does not support the contention that such measures can only be issued, under the UNCITRAL Rules, when specific performance is requested in connection with a contractual relationship. No such restriction is implied under the broad language of Article 26(1) of the UNCITRAL Rules. The specific examples mentioned in that Article, on the contrary, point to a wide discretion in the hands of the Tribunal.
71. Finally, the Tribunal does not find that the Treaty limits the rights of Claimants to requests for monetary compensation. Respondent bases its argument on Articles 4 and 6 of the Treaty.
72. Article 4 indicates indeed that, in the case of nationalization or measures tantamount to nationalization, *“the compensation shall correspond to the real value of the nationalized investments”*. It is quite understandable that, in a situation where a State has exercised its right to takeover a foreign investment under the conditions mentioned in the Treaty, financial compensation would be the proper remedy. But, that Article only applies to cases of nationalization and, even then, it does not restrict what remedy a Tribunal could order where the nationalization does not meet the conditions mentioned in Article 4. Moreover, that Article certainly does not define the remedies available under Article 3 (fair and equitable treatment provision), even though, in practice, financial compensation is the overwhelming form of remedy requested by claimants.
73. As to the relevant part of Article 6 of the Treaty cited by Respondent, it reads as follows:
- “Disputes between one of the Contracting Parties and an investor of the other Contracting Party, arising in connection with realization of investments, including disputes concerning the amount, terms or method of payment of compensation, shall, whenever possible, be settled through negotiations.”*
74. While payment of compensation is specifically mentioned, it is only referred to as one of the types of disputes which may arise under the Treaty but not as the exclusive one.
75. In the Tribunal’s view, the Treaty does not restrict the available remedies of investors to monetary compensation. The three types of remedies available at public international law (*restitutio in integrum*, compensation and satisfaction) remain available under the Treaty.
76. Claimants have raised another argument in support of their request for interim measures on the basis that, in this case, the Tribunal would have reasons to believe that Claimants would encounter serious difficulties in having enforced an award which would be rendered in their favor. They allege in particular the modest financial means of Respondent as well as some recent political turbulence in Mongolia. The Tribunal does not believe that such allegations are sufficient to justify the ordering of interim measures in this case. The Tribunal should not presume that Respondent will not honor its international obligations, if an award is to be eventually rendered against it and nothing in the allegations made by Claimants is of such substance as to justify a different stand.



77. After review of the evidence and the pleadings submitted to it by the Parties, the Tribunal has come to the conclusion that Claimants are facing, in this case, very substantial prejudice unless some interim measures are granted. Immediate payment of the WPT allegedly owing to Mongolia would likely lead to the insolvency and bankruptcy of GEM (Mongolia's second largest gold producer) and the complete loss of Claimants' investment in that company. In an interview published in *Odriyn Sonin*, on December 17, 2007, the Director of Mongolia's Tax Office, Mr. L. Zorig, is reported as saying that "(t)he company's licenses might be suspended or cancelled altogether" unless payment of the WPT was made. Moreover, on February 25, 2008, Respondent commenced enforcement of GEM's tax debt before the Bayangol District Court. Respondent itself subsequently recognized the critical situation of GEM by agreeing not to seize or put a lien on its assets until a final award was rendered in this case, even if payment of the WPT owing was not paid immediately.
78. While it is true that Claimants would still have a recourse in damages and that other arbitral tribunals have indicated that debt aggravation was not sufficient to award interim measures, the unique circumstances of this case justify a different conclusion. In particular, while not putting in doubt the value of the undertaking of Respondent not to seize or put a lien on GEM's assets, the Tribunal believes that it is preferable to formalize that commitment into an interim measures order.

#### 5- Proportionality

79. Under proportionality, the Tribunal is called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties.
80. The Tribunal has just discussed the issue of the burden of immediate payment upon Claimants.
81. In its consideration of this criterion with regard to Respondent, the Tribunal does not question in any way the sovereign right of a State to enact whatever tax measures it deems appropriate at any particular time. Every year, governments around the world propose the adoption of tax measures which constitute either new initiatives or amendments to existing fiscal legislation. There is a presumption of validity in favor of legislative measures adopted by a State and the burden of the proof is upon those who challenge such measures to demonstrate their invalidity. Moreover, a government is generally entitled to demand immediate payment of taxes owing, even if there is a dispute with a taxpayer about them. Finally, the fact that a particular level of taxation would appear excessive to some taxpayers does not make it illegal *per se*, even though it may open the door to contestation, including by foreign investors under a relevant BIT.
82. However, in the present instance, the Government itself has recognized that the WPT Law was not achieving the objectives it had in mind when it was adopted in 2006. This is quite apparent in its attempts, both in 2007 and 2008, to repeal that Law and to replace it with a much more modest taxation regime; similarly with the more recent undertaking made by Respondent not to seize or put a lien upon GEM's assets until a final award has been rendered in this case.

83. Clearly, and quite understandably so, Respondent sees that it is in its own interest that its second largest gold producer should continue its operations. A sudden collapse of GEM would put Respondent in a situation where it would, most likely, be unable to realize a large share of the amount owing to it under the WPT Law and some considerable time could elapse before it could find another investor willing to restart gold production on the relevant properties, unless a new fiscal regime would have been legislated - an eventuality which, considering the 2007 experience, cannot be guaranteed.
84. If Respondent were to prevail, it would be in a position to obtain payment of the full amount owing to it, specially taking into account the security in favor of Respondent to be provided by Claimants according to directions further issued under this Order. If, on the other hand, Claimants were to prevail, Respondent would probably face a claim for lower damages than if GEM's activities had been terminated; this is not an insignificant factor, considering Respondent's tight budgetary constraints.
85. On balance, the Tribunal concludes that there is considerable advantage for both parties in the issuance of interim measures of protection.
86. However, while granting Claimants the requested protection from immediate payment of the WPT and from seizure of or liens upon GEM's assets, the Tribunal also understands Respondent's concern that, at the end of the process, it should not be "thrown the keys" of GEM with assets worth significantly less than the amount of the WPT owing. Hence, its request that, if Claimants' request for interim measures were to be accepted, an escrow account should be established where the full amount of the WPT owing would be deposited until a final award.
87. The Tribunal finds that the Respondent's concern underlying its request in that regard is legitimate but not that setting up an escrow account is the only alternative to address it.
88. If Respondent were to prevail, it would not find itself without possibility of realizing at least part of its tax claim upon GEM's assets, if that company would not be able to pay the whole sum out of its own liquidities. Respondent itself has recognized that GEM's assets currently represent close to 50% of its tax claim, Claimants arguing that those assets are worth significantly more. The present Order provides that those assets and the revenues from future production should remain in Mongolia until a final award has been rendered.
89. In those circumstances, taking into account the value of GEM's assets inside Mongolia, the restrictions in that regard imposed by the Tribunal in the present Order and that GEM's business prospects are likely to improve since it will be free from the WPT burden so long as the present Order remains in place, it does not appear necessary that the security to be provided by Claimants should cover the full value of the claimed WPT; thus, limiting it to about 50% of that amount would be sufficient. At the same time, taking into account GEM's inability to pay the full amount immediately, a schedule of monthly payments by Claimants into the escrow account would be a reasonable solution. Moreover, such payments could be reduced or increased depending on reasonable proof as to the evolution of GEM's business.



90. Article 26 of the UNCITRAL Rules does not mandate any specific type of security. An escrow account is not the exclusive measure of protection from which Respondent could benefit. Different measures with equivalent results can also be considered. The Tribunal is retaining one such measure: the provision of a bank guarantee having the same effect.
91. The Tribunal is giving Claimants the right to choose the option they prefer under the conditions mentioned below.

**ON THE BASIS OF THE ABOVE, THE TRIBUNAL THEREFORE ORDERS AS FOLLOWS**

Claimants' application for interim measures of protection under Article 26 of the UNCITRAL Rules is granted in accordance with the terms and subject to the conditions below:

- 1- Payment to Respondent of the Windfall Profit tax owing by GEM (including interest and penalties) is suspended until the Tribunal has ruled on the merits of Claimants' request for relief.
- 2- Taking note of the undertaking previously made by Respondent on March 19, 2008 and confirmed at the Hearing, Respondent shall refrain from seizing or obtaining a lien on the assets of GEM and other assets of Claimants in connection with the WPT owing to Respondent or from directly or indirectly taking any other action leading to the same or similar effect, except in accordance with the Tribunal's Orders, and shall allow GEM and Claimants to maintain their ordinary business operations in Mongolia.
- 3- Following their previous undertaking in that regard on March 26, 2008, Claimants shall not move assets out of Mongolia, nor take any action which would alter in any way the ownership and/or financial interests of Claimants with respect to their assets in Mongolia, without prior notice to and agreement of Respondent. Sale and pledges of gold are authorized provided the funds thus obtained are used for the ordinary business operations of GEM. Under no circumstances should such funds be used for other purposes; in particular, no transfer of funds or assets of any kind should be made outside of Mongolia (except for deposit into the escrow account under the conditions described below) or to any of the Claimants or any person, corporation or business related to them, without Respondent's agreement.
- 4- Claimants shall provide gradually increasing security as described below. The Tribunal may increase or decrease the security for good cause shown premised on the evolution of GEM's business. Claimants shall submit for approval by the Tribunal, within twenty days of the present Order, a detailed proposal, which will have been discussed with Respondent, concerning the implementation of one of the following measures of protection which they will have selected:
  - a- An escrow account in an internationally recognized financial or other institution outside Mongolia and Russia and acceptable to the Tribunal;

- b- The provision of a bank guarantee to the same effect and under the same conditions from an internationally recognized financial or other institution outside Mongolia and Russia and acceptable to the Tribunal.

If Respondent is not satisfied with the arrangement proposed by Claimants, the Tribunal will issue the appropriate order upon request by one of the Parties.

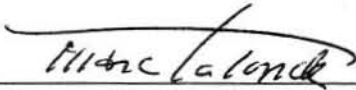
- 5- The cost of the escrow account shall be borne equally by Claimants and Respondent but can be made part of the claim for compensation by each Party.
- 6- Claimants shall deposit in the escrow account (if such is the option retained), on the first working day of each month following the establishment of that account, the sum of US\$2 million, until a final award is rendered in the present case or until the sum in the escrow account has reached 50% of the total amount of the accrued WPT claimed by Respondent, including interest and penalties, whichever comes first. The monies deposited in the escrow account may be invested in financial instruments of high liquidity. The decision regarding the scope of the security is adopted by majority, Dr. Horacio A. Grigera Naón being of the view that tax penalties should be excluded from the determination or calculation of the security.
- 7- Claimants may use the income resulting from the sale of gold by GEM for deposit into the escrow account, provided that, in no circumstance, such transfer would result in a reduction of shareholders' equity in GEM below the sum of MNT 31,578,323,602.35 mentioned at line 2.3.20 of the Balance Sheet of the Financial Statements of December 31, 2007 (after inclusion in the liabilities of the company the amount of WPT payable at that time - but not actually paid - of MNT 35,241,117,584.00 mentioned at line 2.1.1.12)<sup>19</sup>. Each such transfer shall be preceded by an affidavit signed by Director S.V. Paushok and the Chief Accountant of GEM confirming that fact and sent to Respondent and the Tribunal.
- 8- If, instead of the escrow account, the bank guarantee option is retained, arrangements to the same effect shall be put into place.
- 9- Claimants shall, every six months, provide Respondent with a complete list of their assets in Mongolia.
- 10- The scope of this Order does not extend beyond the subject-matter of this dispute and does not prevent Mongolia, after due consideration in good-faith of the Tribunal's direction under paragraph 11 below, from exercising its rights against GEM or Claimants in matters unrelated to this dispute, including taxes owing in other respect than the Windfall Profit Tax.
- 11- The Parties shall refrain, until a final award is rendered in this case, from any action which could lead to further injury and aggravation of the dispute between the Parties.

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<sup>19</sup> CE-93.

- 12- The Tribunal reserves for later consideration its decision on costs arising from these proceedings.
- 13- The Temporary Restraining Order is terminated.
- 14- The Tribunal reserves the right to amend or revoke the present Order at any time during the proceedings, upon request by one of the Parties demonstrating the need for such action. In particular, failure by Claimants to timely provide or maintain the required security could lead to the immediate revocation of the present Order.

FOR THE TRIBUNAL



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The Honorable Marc Lalonde,  
Chairman of the Tribunal

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Date: September 2, 2008

**Exhibit RE-LA-8**



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [Cigar Association of America v. U.S. Food and Drug Administration](#), D.D.C., July 5, 2018

129 S.Ct. 365

Supreme Court of the United States

Donald C. WINTER, Secretary  
of the Navy, et al., Petitioners,

v.

**NATURAL RESOURCES  
DEFENSE COUNCIL, INC.**, et al.

No. 07–1239.

|  
Argued Oct. 8, 2008.

|  
Decided Nov. 12, 2008.

### Synopsis

**Background:** Environmental organizations, which were concerned that the Navy's use of mid-frequency active (MFA) sonar in training exercises would cause serious harm to various species of marine mammals present in the southern California waters, sought a preliminary injunction based on alleged violations of the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Administrative Procedure Act (APA), and the Coastal Zone Management Act (CZMA). The United States District Court for the Central District of California, [Florence Marie Cooper, J.](#), [530 F.Supp.2d 1110](#), granted motion for preliminary injunction. Navy appealed. The Court of Appeals for the Ninth Circuit, [518 F.3d 658](#), [Betty B. Fletcher](#), Circuit Judge, upheld preliminary injunction imposing restrictions

on the Navy's sonar training. Certiorari was granted.

The Supreme Court, Chief Justice [Roberts](#), held that:

plaintiffs seeking preliminary relief are required to demonstrate that irreparable injury is likely in absence of injunction; abrogating [Faith Center Church Evangelistic Ministries v. Glover](#), 480 F.3d 891; [Earth Island Inst. v. United States Forest Serv.](#), 442 F.3d 1147, and

alleged irreparable injury to marine mammals resulting from Navy's training exercises using mid-frequency active (MFA) sonar was outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors.

Reversed.

Justice [Breyer](#), with whom Justice [Stevens](#) joined as to Part I, concurred in part and dissented in part, and filed opinion.

Justice [Ginsburg](#), with whom Justice [Souter](#) joined, dissented and filed opinion.

### \*\*366 Syllabus\*

\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Timber & Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Antisubmarine warfare is one of the Navy's highest priorities. The Navy's fleet faces a significant threat from modern diesel-electric submarines, which are extremely difficult to detect and track because they can operate almost silently. The most effective tool for identifying submerged diesel-electric submarines is active sonar, which emits pulses of sound underwater and then receives the acoustic waves that echo off the target. Active sonar is a complex technology, and sonar operators must undergo extensive training to become proficient in its use.

This case concerns the Navy's use of "mid-frequency active" (MFA) sonar during integrated training exercises in the waters off southern California (SOCAL). In these exercises, ships, submarines, and aircraft train together as members of a "strike group." Due to the importance of antisubmarine warfare, a strike group may not be certified for deployment until it demonstrates proficiency in the use of active sonar to detect, track, and neutralize enemy submarines.

The SOCAL waters contain at least 37 species of marine mammals. The plaintiffs—groups and individuals devoted to the protection of marine mammals and ocean habitats—assert that MFA sonar causes serious injuries to these animals. The Navy disputes that claim, noting that MFA sonar training in SOCAL waters has been conducted for 40 years without a single documented sonar-related injury to any marine mammal. Plaintiffs sued the Navy, seeking declaratory and injunctive relief on the grounds that the training exercises

violated the National Environmental Policy Act of 1969 (NEPA) and other federal laws; in particular, plaintiffs contend that the Navy should have prepared an environmental impact statement (EIS) before conducting the latest round of SOCAL exercises.

The District Court entered a preliminary injunction prohibiting the Navy from using MFA sonar during its training exercises. The Court of Appeals held that this injunction was overbroad and remanded to the District Court for a narrower remedy. The District Court then entered another preliminary injunction, imposing six restrictions on the Navy's use of sonar during its SOCAL training exercises. As relevant to this case, the injunction required the Navy to shut down MFA sonar when a marine mammal was spotted within 2,200 yards of a vessel, and to power down sonar by 6 decibels during conditions known as "surface ducting."

**\*\*367** The Navy then sought relief from the Executive Branch. The Council on Environmental Quality (CEQ) authorized the Navy to implement "alternative arrangements" to NEPA compliance in light of "emergency circumstances." The CEQ allowed the Navy to continue its training exercises under voluntary mitigation procedures that the Navy had previously adopted.

The Navy moved to vacate the District Court's preliminary injunction in light of the CEQ's actions. The District Court refused to do so, and the Court of



Appeals affirmed. The Court of Appeals held that there was a serious question whether the CEQ's interpretation of the "emergency circumstances" regulation was lawful, that plaintiffs had carried their burden of establishing a "possibility" of irreparable injury, and that the preliminary injunction was appropriate because the balance of hardships and consideration of the public interest favored the plaintiffs. The Court of Appeals emphasized that any negative impact of the injunction on the Navy's training exercises was "speculative," and determined that (1) the 2,200-yard shutdown zone was unlikely to affect naval operations, because MFA sonar systems are often shut down during training exercises; and (2) the power-down requirement during surface ducting conditions was not unreasonable, because such conditions are rare and the Navy has previously certified strike groups not trained under these conditions.

*Held:* The preliminary injunction is vacated to the extent challenged by the Navy. The balance of equities and the public interest—which were barely addressed by the District Court—tip strongly in favor of the Navy. The Navy's need to conduct realistic training with active sonar to respond to the threat posed by enemy submarines plainly outweighs the interests advanced by the plaintiffs. Pp. 374 – 382.

(a) The lower courts held that when a plaintiff demonstrates a strong likelihood of success on the merits, a preliminary injunction may be entered based only on a "possibility" of irreparable harm.

The "possibility" standard is too lenient. This Court's frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.

Even if plaintiffs have demonstrated a likelihood of irreparable injury, such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. For the same reason, it is unnecessary to address the lower courts' holding that plaintiffs have established a likelihood of success on the merits. Pp. 374 – 377.

(b) A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences. [Weinberger v. Romero-Barcelo](#), 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91. Military interests do not always trump other considerations, and the Court has not held that they do, but courts must give deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. [Goldman v. Weinberger](#), 475 U.S. 503, 507, 106 S.Ct. 1310, 89 L.Ed.2d 478.

Here, the record contains declarations from some of the Navy's most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat. Those officers

emphasized that realistic training cannot be accomplished under the two challenged restrictions imposed **\*\*368** by the District Court—the 2,200-yard shutdown zone and the power-down requirement during surface ducting conditions. The use of MFA sonar under realistic conditions during training exercises is clearly of the utmost importance to the Navy and the Nation. The Court does not question the importance of plaintiffs' ecological, scientific, and recreational interests, but it concludes that the balance of equities and consideration of the overall public interest tip strongly in favor of the Navy. The determination of where the public interest lies in this case does not strike the Court as a close question. Pp. 376 – 378.

(c) The lower courts' justifications for entering the preliminary injunction are not persuasive. Pp. 377 – 381.

(1) The District Court did not give serious consideration to the balance of equities and the public interest. The Court of Appeals did consider these factors and conclude that the Navy's concerns about the preliminary injunction were “speculative.” But that is almost always the case when a plaintiff seeks injunctive relief to alter a defendant's conduct. The lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises. Pp. 377 – 378.

(2) The District Court abused its discretion by requiring the Navy to shut down MFA

sonar when a marine mammal is spotted within 2,200 yards of a sonar-emitting vessel. The Court of Appeals concluded that the zone would not be overly burdensome because marine mammal sightings during training exercises are relatively rare. But regardless of the frequency of such sightings, the injunction will increase the radius of the shutdown zone from 200 to 2,200 yards, which expands its surface area by a factor of over 100. Moreover, because training scenarios can take several days to develop, each additional shutdown can result in the loss of several days' worth of training. The Court of Appeals also concluded that the shutdown zone would not be overly burdensome because the Navy had shut down MFA sonar several times during prior exercises when marine mammals were spotted well beyond the Navy's self-imposed 200-yard zone. But the court ignored undisputed evidence that these voluntary shutdowns only occurred during tactically insignificant times. Pp. 378 – 380.

(3) The District Court also abused its discretion by requiring the Navy to power down MFA sonar by 6 decibels during significant surface ducting conditions. When surface ducting occurs, active sonar becomes more useful near the surface, but less effective at greater depths. Diesel-electric submariners are trained to take advantage of these distortions to avoid being detected by sonar. The Court of Appeals concluded that the power-down requirement was reasonable because surface ducting occurs relatively rarely, and the Navy has previously certified strike groups that did not train under such conditions. This reasoning is backwards.

Given that surface ducting is both rare and unpredictable, it is especially important for the Navy to be able to train under these conditions when they occur. Pp. 380 – 381.

(4) The Navy has previously taken voluntary measures to address concerns about marine mammals, and has chosen not to challenge four other restrictions imposed by the District Court in this case. But that hardly means that other, more intrusive restrictions pose no threat to preparedness for war. The Court of Appeals noted that the Navy could return to the District Court to seek modification of the **\*\*369** preliminary injunction if it actually resulted in an inability to train. The Navy is not required to wait until it is unable to train sufficient forces for national defense before seeking dissolution of the preliminary injunction. By then it may be too late. Pp. 380 – 381.

(d) This Court does not address the underlying merits of plaintiffs' claims, but the foregoing analysis makes clear that it would also be an abuse of discretion to enter a permanent injunction along the same lines as the preliminary injunction. Plaintiffs' ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training. There is accordingly no basis for enjoining such training pending preparation of an EIS—if one is determined to be required—when doing so is credibly alleged to pose a serious threat to national security. There are many other remedial tools available, including declaratory relief or an injunction specifically tailored to preparation of an EIS, that do not carry such dire consequences. Pp. 380 – 382.

518 F.3d 658, reversed; preliminary injunction vacated in part.

**ROBERTS**, C.J., delivered the opinion of the Court, in which **SCALIA**, **KENNEDY**, **THOMAS**, and **ALITO**, JJ., joined. **BREYER**, J., filed an opinion concurring in part and dissenting in part, in which **STEVENS**, J., joined as to Part I, *post*, pp. 382 – 387. **GINSBURG**, J., filed a dissenting opinion, in which **SOUTER**, J., joined, *post*, pp. 387 – 393.

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## Opinion

**\*\*370** Chief Justice [ROBERTS](#) delivered the opinion of the Court.

**\*12** “To be prepared for war is one of the most effectual means of preserving peace.” 1 Messages and Papers of the Presidents 57 (J. Richardson comp. 1897). So said George Washington in his first Annual Address to Congress, 218 years ago. One of the most important ways the

Navy prepares for war is through integrated training exercises at sea. These exercises include training in the use of modern sonar to detect and track enemy submarines, something the Navy has done for the past 40 years. The plaintiffs, respondents here, complained that the Navy's sonar-training program harmed marine mammals, and that the Navy should have prepared an environmental impact statement before commencing its latest round of training exercises. The Court of Appeals upheld a preliminary injunction imposing restrictions on the Navy's sonar training, even though that court acknowledged that “the record contains no evidence that marine mammals have been harmed” by the Navy's exercises. [518 F.3d 658, 696 \(C.A.9 2008\)](#).

The Court of Appeals was wrong, and its decision is reversed.

## I

The Navy deploys its forces in “strike groups,” which are groups of surface ships, submarines, and aircraft centered around either an aircraft carrier or an amphibious assault ship. App. to Pet. for Cert. 316a–317a (Pet. App.). Seamless coordination among strike-group assets is critical. Before deploying a strike group, the Navy requires extensive integrated training in analysis and prioritization of threats, execution of military missions, and maintenance of force protection. App. 110–111.

Antisubmarine warfare is currently the Pacific Fleet's top war-fighting priority.

Pet.App. 270a–271a. Modern diesel-electric submarines pose a significant threat to Navy vessels because they can operate almost silently, making them extremely \*13 difficult to detect and track. Potential adversaries of the United States possess at least 300 of these submarines. App. 571.

The most effective technology for identifying submerged diesel-electric submarines within their torpedo range is active sonar, which involves emitting pulses of sound underwater and then receiving the acoustic waves that echo off the target. Pet.App. 266a–267a, 274a. Active sonar is a particularly useful tool because it provides both the bearing and the distance of target submarines; it is also sensitive enough to allow the Navy to track enemy submarines that are quieter than the surrounding marine environment.<sup>1</sup> This case concerns the Navy's use of “mid-frequency active” (MFA) sonar, which transmits sound waves at frequencies between 1 kHz and 10 kHz.

<sup>1</sup> In contrast, passive sonar “listens” for sound waves but does not introduce sound into the water. Passive sonar is not effective for tracking diesel-electric submarines because those vessels can operate almost silently. Passive sonar also has a more limited range than active sonar, and cannot identify the exact location of an enemy submarine. Pet.App. 266a–271a.

Not surprisingly, MFA sonar is a complex technology, and sonar operators must undergo extensive training to become proficient in its use. Sonar reception can be affected by countless different factors, including the time of day, water density, salinity, currents, weather conditions, and

the contours of the sea floor. *Id.*, at 278a–279a. When working as part of a strike group, sonar operators must be able to coordinate with other Navy ships and planes while avoiding interference. The Navy conducts regular training exercises \*\*371 under realistic conditions to ensure that sonar operators are thoroughly skilled in its use in a variety of situations.

The waters off the coast of southern California (SOCAL) are an ideal location for conducting integrated training exercises, as this is the only area on the west coast that is relatively close to land, air, and sea bases, as well as amphibious \*14 landing areas. App. 141–142. At issue in this case are the Composite Training Unit Exercises and the Joint Tactical Force Exercises, in which individual naval units (ships, submarines, and aircraft) train together as members of a strike group. A strike group cannot be certified for deployment until it has successfully completed the integrated training exercises, including a demonstration of its ability to operate under simulated hostile conditions. *Id.*, at 564–565. In light of the threat posed by enemy submarines, all strike groups must demonstrate proficiency in antisubmarine warfare. Accordingly, the SOCAL exercises include extensive training in detecting, tracking, and neutralizing enemy submarines. The use of MFA sonar during these exercises is “mission-critical,” given that MFA sonar is the only proven method of identifying submerged diesel-electric submarines operating on battery power. *Id.*, at 568–571.



Sharing the waters in the SOCAL operating area are at least 37 species of marine mammals, including dolphins, whales, and sea lions. The parties strongly dispute the extent to which the Navy's training activities will harm those animals or disrupt their behavioral patterns. The Navy emphasizes that it has used MFA sonar during training exercises in SOCAL for 40 years, without a single documented sonar-related injury to any marine mammal. The Navy asserts that, at most, MFA sonar may cause temporary hearing loss or brief disruptions of marine mammals' behavioral patterns.

The plaintiffs are the Natural Resources Defense Council, Inc., Jean-Michael Cousteau (an environmental enthusiast and filmmaker), and several other groups devoted to the protection of marine mammals and ocean habitats. They contend that MFA sonar can cause much more serious injuries to marine mammals than the Navy acknowledges, including permanent hearing loss, [decompression sickness](#), and major behavioral disruptions. According to the plaintiffs, several mass strandings of marine mammals (outside of SOCAL) \*15 have been “associated” with the use of active sonar. They argue that certain species of marine mammals—such as beaked whales—are uniquely susceptible to injury from active sonar; these injuries would not necessarily be detected by the Navy, given that beaked whales are “very deep divers” that spend little time at the surface.

## II

The procedural history of this case is rather complicated. The Marine Mammal Protection Act of 1972 (MMPA), 86 Stat. 1027, generally prohibits any individual from “taking” a marine mammal, defined as harassing, hunting, capturing, or killing it. [16 U.S.C. §§ 1362\(13\), 1372\(a\)](#). The Secretary of Defense may “exempt any action or category of actions” from the MMPA if such actions are “necessary for national defense.” § 1371(f)(1). In January 2007, the Deputy Secretary of Defense—acting for the Secretary—granted the Navy a 2-year exemption from the MMPA for the training exercises at issue in this case. Pet.App. 219a–220a. The exemption was conditioned on the Navy adopting several mitigation procedures, including: (1) training lookouts and officers to watch for marine mammals; (2) requiring at least five lookouts with binoculars \*\*372 on each vessel to watch for anomalies on the water surface (including marine mammals); (3) requiring aircraft and sonar operators to report detected marine mammals in the vicinity of the training exercises; (4) requiring reduction of active sonar transmission levels by 6 dB if a marine mammal is detected within 1,000 yards of the bow of the vessel, or by 10 dB if detected within 500 yards; (5) requiring complete shutdown of active sonar transmission if a marine mammal is detected within 200 yards of the vessel; (6) requiring active sonar to be operated at the “lowest practicable level”; and (7) adopting coordination and reporting procedures. *Id.*, at 222a–230a.

The National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, requires federal agencies “to the fullest extent \*16



possible” to prepare an environmental impact statement (EIS) for “every ... major Federal actio[n] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2000 ed.). An agency is not required to prepare a full EIS if it determines—based on a shorter environmental assessment (EA)—that the proposed action will not have a significant impact on the environment. 40 CFR §§ 1508.9(a), 1508.13 (2007).

In February 2007, the Navy issued an EA concluding that the 14 SOCAL training exercises scheduled through January 2009 would not have a significant impact on the environment. App. 226–227. The EA divided potential injury to marine mammals into two categories: Level A harassment, defined as the potential destruction or loss of biological tissue (*i.e.*, physical injury), and Level B harassment, defined as temporary injury or disruption of behavioral patterns such as migration, feeding, surfacing, and breeding. *Id.*, at 160–161.

The Navy's computer models predicted that the SOCAL training exercises would cause only eight Level A harassments of common dolphins each year, and that even these injuries could be avoided through the Navy's voluntary mitigation measures, given that dolphins travel in large pods easily located by Navy lookouts. *Id.*, at 176–177, 183. The EA also predicted 274 Level B harassments of beaked whales per year, none of which would result in permanent injury. *Id.*, at 185–186. Beaked whales spend little time at the surface, so the precise effect of active sonar on these mammals is unclear. Erring

on the side of caution, the Navy classified all projected harassments of beaked whales as Level A. *Id.*, at 186, 223. In light of its conclusion that the SOCAL training exercises would not have a significant impact on the environment, the Navy determined that it was unnecessary to prepare a full EIS. See 40 CFR § 1508.13.

Shortly after the Navy released its EA, the plaintiffs sued the Navy, seeking declaratory and injunctive relief on the grounds that the Navy's SOCAL training exercises violated \*17 NEPA, the Endangered Species Act of 1973(ESA), and the Coastal Zone Management Act of 1972 (CZMA).<sup>2</sup> The District Court granted plaintiffs' motion for a preliminary injunction and prohibited the Navy from using MFA sonar during its remaining training exercises. The court held that plaintiffs had “demonstrated a probability of success” on their claims under NEPA and the CZMA. Pet.App. 207a, 215a. The court also determined that equitable relief was \*\*373 appropriate because, under Ninth Circuit precedent, plaintiffs had established at least a “‘possibility’ ” of irreparable harm to the environment. *Id.*, at 217a. Based on scientific studies, declarations from experts, and other evidence in the record, the District Court concluded that there was in fact a “near certainty” of irreparable injury to the environment, and that this injury outweighed any possible harm to the Navy. *Id.*, at 217a–218a.

2 The CZMA states that federal agencies taking actions “that affect [t] any land or water use or natural resource of the coastal zone” shall carry out these activities “in a manner which is consistent to the

maximum extent practicable with the enforceable policies of approved State management programs.”  
16 U.S.C. § 1456(c)(1)(A).

The Navy filed an emergency appeal, and the Ninth Circuit stayed the injunction pending appeal. 502 F.3d 859, 865 (2007). After hearing oral argument, the Court of Appeals agreed with the District Court that preliminary injunctive relief was appropriate. The appellate court concluded, however, that a blanket injunction prohibiting the Navy from using MFA sonar in SOCAL was overbroad, and remanded the case to the District Court “to narrow its injunction so as to provide mitigation conditions under which the Navy may conduct its training exercises.” 508 F.3d 885, 887 (2007).

On remand, the District Court entered a new preliminary injunction allowing the Navy to use MFA sonar only as long as it implemented the following mitigation measures (in addition to the measures the Navy had adopted pursuant to its MMPA exemption): (1) imposing a 12 nautical mile “exclusion \*18 zone” from the coastline; (2) using lookouts to conduct additional monitoring for marine mammals; (3) restricting the use of “helicopter-dipping” sonar; (4) limiting the use of MFA sonar in geographic “choke points”; (5) shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and (6) powering down MFA sonar by 6 dB during significant surface ducting conditions, in which sound travels further than it otherwise would due to temperature differences in adjacent layers of water. 530 F.Supp.2d 1110, 1118–1121 (C.D.Cal.2008). The Navy

filed a notice of appeal, challenging only the last two restrictions.

The Navy then sought relief from the Executive Branch. The President, pursuant to 16 U.S.C. § 1456(c)(1)(B), granted the Navy an exemption from the CZMA. Section 1456(c)(1)(B) permits such exemptions if the activity in question is “in the paramount interest of the United States.” The President determined that continuation of the exercises as limited by the Navy was “essential to national security.” Pet.App. 232a. He concluded that compliance with the District Court’s injunction would “undermine the Navy’s ability to conduct realistic training exercises that are necessary to ensure the combat effectiveness of ... strike groups.” *Ibid.*

Simultaneously, the Council on Environmental Quality (CEQ) authorized the Navy to implement “alternative arrangements” to NEPA compliance in light of “emergency circumstances.” See 40 CFR § 1506.11.<sup>3</sup> The CEQ determined that alternative arrangements were appropriate because the District Court’s injunction “create[s] a significant and unreasonable risk that Strike Groups will not be \*19 able to train and be certified as fully mission capable.” Pet.App. 238a. Under the alternative arrangements, the Navy would be permitted to conduct its training exercises under the mitigation procedures adopted in conjunction with the exemption \*\*374 from the MMPA. The CEQ also imposed additional notice, research, and reporting requirements.

3 That provision states in full: “Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.”

In light of these actions, the Navy then moved to vacate the District Court's injunction with respect to the 2,200–yard shutdown zone and the restrictions on training in surface ducting conditions. [The District Court refused to do so, 527 F.Supp.2d 1216 \(2008\)](#), and the Court of Appeals affirmed. The Ninth Circuit held that there was a serious question regarding whether the CEQ's interpretation of the “emergency circumstances” regulation was lawful. Specifically, the court questioned whether there was a true “emergency” in this case, given that the Navy has been on notice of its obligation to comply with NEPA from the moment it first planned the SOCAL training exercises. [518 F.3d, at 681](#). The Court of Appeals concluded that the preliminary injunction was entirely predictable in light of the parties' litigation history. *Ibid.* The court also held that plaintiffs had established a likelihood of success on their claim that the Navy was required to prepare a full EIS for the SOCAL training exercises. *Id.*, at 693. The Ninth Circuit agreed with the District Court's holding that the Navy's EA—which resulted in a finding of no significant environmental impact—was “cursory, unsupported by cited evidence, or unconvincing.” *Ibid.*<sup>4</sup>

4 The Ninth Circuit's discussion of the plaintiffs' likelihood of success was limited to their NEPA claims. The court did not discuss claims under the CZMA or ESA.

The Court of Appeals further determined that plaintiffs had carried their burden of establishing a “possibility” of irreparable injury. Even under the Navy's own figures, the court concluded, the training exercises would cause 564 physical injuries to marine mammals, as well as 170,000 disturbances \*20 of marine mammals' behavior. *Id.*, at 696. Lastly, the Court of Appeals held that the balance of hardships and consideration of the public interest weighed in favor of the plaintiffs. The court emphasized that the negative impact on the Navy's training exercises was “speculative,” since the Navy has never before operated under the procedures required by the District Court. *Id.*, at 698–699. In particular, the court determined that: (1) The 2,200–yard shutdown zone imposed by the District Court was unlikely to affect the Navy's operations, because the Navy often shuts down its MFA sonar systems during the course of training exercises; and (2) the power-down requirement during significant surface ducting conditions was not unreasonable because such conditions are rare, and the Navy has previously certified strike groups that had not trained under such conditions. *Id.*, at 699–702. The Ninth Circuit concluded that the District Court's preliminary injunction struck a proper balance between the competing interests at stake.

We granted certiorari, [554 U.S. 916, 128 S.Ct. 2964, 171 L.Ed.2d 883 \(2008\)](#), and now reverse and vacate the injunction.

## III

## A

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. See *Munaf v. Geren*, 553 U.S. 674, 689 – 690, 128 S.Ct. 2207, 2218–2219, 171 L.Ed.2d 1 (2008); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982).

**\*\*375** The District Court and the Ninth Circuit concluded that plaintiffs have shown a likelihood of success on the merits of their NEPA claim. The Navy strongly disputes this determination, arguing that plaintiffs' likelihood of success is low because the CEQ reasonably concluded that “emergency \*21 circumstances” justified alternative arrangements to NEPA compliance. [40 CFR § 1506.11](#). Plaintiffs' briefs before this Court barely discuss the ground relied upon by the lower courts—that the plain meaning of “emergency circumstances” does not encompass a court order that was “entirely predictable” in light of the parties' litigation history. [518 F.3d, at 681](#). Instead, plaintiffs contend that the CEQ's actions violated the separation of powers by readjudicating a

factual issue already decided by an Article III court. Moreover, they assert that the CEQ's interpretations of NEPA are not entitled to deference because the CEQ has not been given statutory authority to conduct adjudications.

The District Court and the Ninth Circuit also held that when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a “possibility” of irreparable harm. *Id.*, at 696–697; [530 F.Supp.2d, at 1118](#) (quoting *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 906 (C.A.9 2007); *Earth Island Inst. v. United States Forest Serv.*, 442 F.3d 1147, 1159 (C.A.9 2006)). The lower courts held that plaintiffs had met this standard because the scientific studies, declarations, and other evidence in the record established to “a near certainty” that the Navy's training exercises would cause irreparable harm to the environment. [530 F.Supp.2d, at 1118](#).

The Navy challenges these holdings, arguing that plaintiffs must demonstrate a likelihood of irreparable injury—not just a possibility—in order to obtain preliminary relief. On the facts of this case, the Navy contends that plaintiffs' alleged injuries are too speculative to give rise to irreparable injury, given that ever since the Navy's training program began 40 years ago, there has been no documented case of sonar-related injury to marine mammals in SOCAL. And even if MFA sonar does cause a limited number of injuries to individual *marine mammals*, the Navy asserts that plaintiffs have failed to offer evidence of species-



level harm that **\*22** would adversely affect *their* scientific, recreational, and ecological interests. For their part, plaintiffs assert that they would prevail under any formulation of the irreparable injury standard, because the District Court found that they had established a “near certainty” of irreparable harm.

We agree with the Navy that the Ninth Circuit's “possibility” standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. *Los Angeles v. Lyons*, 461 U.S. 95, 103, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974); *O’Shea v. Littleton*, 414 U.S. 488, 502, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); see also 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948.1, p. 139 (2d ed.1995) (hereinafter Wright & Miller) (applicant must demonstrate that in the absence of a preliminary injunction, “the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered”); *id.*, at 154 – 155, 94 S.Ct. 669 (“[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury”). Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our **\*\*376** characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (*per curiam*).

It is not clear that articulating the incorrect standard affected the Ninth Circuit's analysis of irreparable harm. Although the court referred to the “possibility” standard, and cited Circuit precedent along the same lines, it affirmed the District Court's conclusion that plaintiffs had established a “‘near certainty’” of irreparable harm. 518 F.3d, at 696–697. At the same time, however, the nature of the District Court's conclusion is itself unclear. The District Court originally found irreparable harm from sonar-training exercises generally. But by the time of the District Court's final decision, the Navy challenged only two of six restrictions **\*23** imposed by the court. See *supra*, at 373 – 374. The District Court did not reconsider the likelihood of irreparable harm in light of the four restrictions not challenged by the Navy. This failure is significant in light of the District Court's own statement that the 12 nautical mile exclusion zone from the coastline—one of the unchallenged mitigation restrictions—“would bar the use of MFA sonar in a significant portion of important marine mammal habitat.” 530 F.Supp.2d, at 1119.

We also find it pertinent that this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment. When the Government conducts an activity, “NEPA itself does not mandate particular results.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). Instead, NEPA imposes only procedural requirements to “ensur[e]

that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.” *Id.*, at 349, 109 S.Ct. 1835. Part of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures. Here, in contrast, the plaintiffs are seeking to enjoin—or substantially restrict—training exercises that have been taking place in SOCAL for the last 40 years. And the latest series of exercises were not approved until after the defendant took a “hard look at environmental consequences,” *id.*, at 350, 109 S.Ct. 1835 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976); internal quotation marks omitted), as evidenced by the issuance of a detailed, 293–page EA.

As explained in the next section, even if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. A proper consideration of these factors alone requires denial of the requested injunctive relief. For the same reason, we \*24 do not address the lower courts' holding that plaintiffs have also established a likelihood of success on the merits.

## B

A preliminary injunction is an extraordinary remedy never awarded as of right. *Munaf*, 553 U.S., at 689 – 690, 128 S.Ct., at 2218–2219. In each case, courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Amoco Production Co.*, 480 U.S., at 542, 107 S.Ct. 1396. “In exercising their sound discretion, courts of equity should pay particular regard for the \*\*\*377 public consequences in employing the extraordinary remedy of injunction.” *Romero–Barcelo*, 456 U.S., at 312, 102 S.Ct. 1798; see also *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971 (1941). In this case, the District Court and the Ninth Circuit significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises, and the injunction's consequent adverse impact on the public interest in national defense.

This case involves “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force,” which are “essentially professional military judgments.” *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973). We “give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986). As the Court emphasized just last Term, “neither the Members of this Court nor most federal judges begin the day with briefings that



may describe new and serious threats to our Nation and its people.” *Boumediene v. Bush*, 553 U.S. 723, 797, 128 S.Ct. 2229, 171 L.Ed.2d 41, 2008 WL 4722127 (2008).

Here, the record contains declarations from some of the Navy's most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat. Admiral Gary \*25 Roughead—the Chief of Naval Operations—stated that during training exercises:

“It is important to stress the ship crews in all dimensions of warfare simultaneously. If one of these training elements were impacted—for example, if effective sonar training were not possible—the training value of the other elements would also be degraded....” Pet.App. 342a.

Captain Martin May—the Third Fleet's Assistant Chief of Staff for Training and Readiness—emphasized that the use of MFA sonar is “mission-critical.” App. 570–571. He described the ability to operate MFA sonar as a “highly perishable skill” that must be repeatedly practiced under realistic conditions. *Id.*, at 577. During training exercises, MFA sonar operators learn how to avoid sound-reducing “clutter” from ocean floor topography and environmental conditions; they also learn how to avoid interference and how to coordinate their efforts with other sonar operators in the strike group. *Id.*, at 574. Several Navy officers emphasized that realistic training cannot be accomplished under the two challenged restrictions imposed by the District Court

—the 2,200-yard shutdown zone and the requirement that the Navy power down its sonar systems during significant surface ducting conditions. See, e.g., Pet.App. 333a (powering down in presence of surface ducting “unreasonably prevent[s] realistic training”); *id.*, at 356a (shutdown zone would “result in a significant, adverse impact to realistic training”). We accept these officers' assertions that the use of MFA sonar under realistic conditions during training exercises is of the utmost importance to the Navy and the Nation.

These interests must be weighed against the possible harm to the ecological, scientific, and recreational interests that are legitimately before this Court. Plaintiffs have submitted declarations asserting that they take whale watching trips, observe marine mammals underwater, conduct scientific \*26 research on marine mammals, and photograph these animals in their natural habitats. Plaintiffs contend that the Navy's use of MFA sonar will injure marine \*\*378 mammals or alter their behavioral patterns, impairing plaintiffs' ability to study and observe the animals.

While we do not question the seriousness of these interests, we conclude that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy. For the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe. In contrast, forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of

the fleet. Active sonar is the only reliable technology for detecting and tracking enemy diesel-electric submarines, and the President—the Commander in Chief—has determined that training with active sonar is “essential to national security.” *Id.*, at App. 232a.

The public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs. Of course, military interests do not always trump other considerations, and we have not held that they do. In this case, however, the proper determination of where the public interest lies does not strike us as a close question.

## C

1. Despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion. The court's entire discussion of these factors consisted of one (albeit lengthy) sentence: “The Court is also satisfied that the balance of hardships tips in favor of granting an injunction, as the harm to the environment, Plaintiffs, and public interest outweighs the harm that Defendants would incur if prevented from using MFA sonar, absent the use of effective mitigation \*27 measures, during a subset of their regular activities in one part of one state for a limited period.” *Id.*, at 217a–218a. As the prior Ninth Circuit panel in this case put it, in staying the District Court's original preliminary injunction, “[t]he district court

did not give serious consideration to the public interest factor.” 502 F.3d, at 863. The District Court's order on remand did nothing to cure this defect, but simply repeated nearly verbatim the same sentence from its previous order. Compare 530 F.Supp.2d, at 1118, with Pet.App. 217a–218a. The subsequent Ninth Circuit panel framed its opinion as reviewing the District Court's exercise of discretion, 518 F.3d, at 697–699, but that discretion was barely exercised here.

The Court of Appeals held that the balance of equities and the public interest favored the plaintiffs, largely based on its view that the preliminary injunction would not in fact impose a significant burden on the Navy's ability to conduct its training exercises and certify its strike groups. *Id.*, at 698–699. The court deemed the Navy's concerns about the preliminary injunction “speculative” because the Navy had not operated under similar procedures before. *Ibid.* But this is almost always the case when a plaintiff seeks injunctive relief to alter a defendant's conduct. The lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises. See *Wright & Miller § 2948.2*, at 167–168 (“The policy against the imposition of judicial restraints prior to an adjudication of the merits becomes more significant when there is reason to believe that the decree will be burdensome”).

2. The preliminary injunction requires the Navy to shut down its MFA sonar if a

**\*\*379** marine mammal is detected within 2,200 yards of a sonar-emitting vessel. The Ninth Circuit stated that the 2,200-yard shutdown zone would not be overly burdensome because sightings of marine mammals **\*28** during training exercises are relatively rare. But regardless of the frequency of marine mammal sightings, the injunction will greatly increase the size of the shutdown zone. Pursuant to its exemption from the MMPA, the Navy agreed to reduce the power of its MFA sonar at 1,000 yards and 500 yards, and to completely turn off the system at 200 yards. Pet.App. 222a–230a. The District Court's injunction does not include a graduated power-down, instead requiring a total shutdown of MFA sonar if a marine mammal is detected within 2,200 yards of a sonar-emitting vessel. There is an exponential relationship between radius length and surface area ( $\text{Area} = r^2$ ). Increasing the radius of the shutdown zone from 200 to 2,200 yards would accordingly expand the surface area of the shutdown zone by a factor of over 100 (from 125,664 square yards to 15,205,308 square yards).

The lower courts did not give sufficient weight to the views of several top Navy officers, who emphasized that because training scenarios can take several days to develop, each additional shutdown can result in the loss of several days' worth of training. *Id.*, at 344a. Limiting the number of sonar shutdowns is particularly important during the Joint Tactical Force Exercises, which usually last for less than two weeks. *Ibid.* Rear Admiral John Bird explained that the 2,200-yard shutdown zone would cause operational commanders to “lose

awareness of the tactical situation through the constant stopping and starting of MFA [sonar].” *Id.*, at 332a; see also *id.*, at 356a (“It may take days to get to the pivotal attack in antisubmarine warfare, but only minutes to confound the results upon which certification is based”). Even if there is a low likelihood of a marine mammal sighting, the preliminary injunction would clearly increase the number of disruptive sonar shutdowns the Navy is forced to perform during its SOCAL training exercises.

The Court of Appeals also concluded that the 2,200-yard shutdown zone would not be overly burdensome because the Navy had shut down MFA sonar 27 times during its eight **\*29** prior training exercises in SOCAL; in several of these cases, the Navy turned off its sonar when marine mammals were spotted well beyond the Navy's self-imposed 200-yard shutdown zone. [518 F.3d, at 700, n. 65](#). Vice Admiral Samuel Locklear III—the Commander of the Navy's Third Fleet—stated that any shutdowns beyond the 200-yard zone were voluntary avoidance measures that likely took place at tactically insignificant times; the Ninth Circuit discounted this explanation as not supported by the record. *Ibid.* In reaching this conclusion, the Court of Appeals ignored key portions of Vice Admiral Locklear's declaration, in which he stated unequivocally that commanding officers “would not shut down sonar until legally required to do so if in contact with a submarine.” Pet.App. 354a–355a. Similarly, if a commanding officer is in contact with a target submarine, “the CO will be expected to continue to use active sonar unless

another ship or helicopter can gain contact or if regulatory reasons dictate otherwise.” *Id.*, at 355a. The record supports the Navy's contention that its shutdowns of MFA sonar during prior training exercises only occurred during tactically insignificant times; those voluntary shutdowns do not justify the District Court's imposition of a mandatory 2,200-yard shutdown zone.

Lastly, the Ninth Circuit stated that a 2,200-yard shutdown zone was feasible because the Navy had previously adopted a 2,000-meter zone for low-frequency active **\*\*380** (LFA) sonar. The Court of Appeals failed to give sufficient weight to the fact that LFA sonar is used for long-range detection of enemy submarines, and thus its use and shutdown involve tactical considerations quite different from those associated with MFA sonar. See App. 508 (noting that equating MFA sonar with LFA sonar “is completely misleading and is like comparing 20 degrees Fahrenheit to 20 degrees Celsius”).

3. The Court of Appeals also concluded that the Navy's training exercises would not be significantly affected by the requirement that it power down MFA sonar by 6 dB during **\*30** significant surface ducting conditions. Again, we think the Ninth Circuit understated the burden this requirement would impose on the Navy's ability to conduct realistic training exercises.

Surface ducting is a phenomenon in which relatively little sound energy penetrates beyond a narrow layer near the surface of the water. When surface ducting occurs,

active sonar becomes more useful near the surface but less useful at greater depths. Pet.App. 299a–300a. Diesel-electric submariners are trained to take advantage of these distortions to avoid being detected by sonar. *Id.*, at 333a.

The Ninth Circuit determined that the power-down requirement during surface ducting conditions was unlikely to affect certification of the Navy's strike groups because surface ducting occurs relatively rarely, and the Navy has previously certified strike groups that did not train under such conditions. [518 F.3d, at 701–702](#). This reasoning is backwards. Given that surface ducting is both rare and unpredictable, it is especially important for the Navy to be able to train under these conditions when they occur. Rear Admiral Bird explained that the 6 dB power-down requirement makes the training less valuable because it “exposes [sonar operators] to unrealistically lower levels of mutual interference caused by multiple sonar systems operating together by the ships within the Strike Group.” Pet.App. 281a (footnote and some capitalization omitted). Although a 6 dB reduction may not seem terribly significant, decibels are measured on a logarithmic scale, so a 6 dB decrease in power equates to a 75% reduction. *Id.*, at 284a–285a.

4. The District Court acknowledged that “ ‘the imposition of these mitigation measures will require the Navy to alter and adapt the way it conducts antisubmarine warfare training—a substantial challenge. Nevertheless, evidence presented to the Court reflects that the Navy has employed



mitigation measures in the past, without sacrificing training \*31 objectives.’ ” 527 F.Supp.2d, at 1238. Apparently no good deed goes unpunished. The fact that the Navy has taken measures in the past to address concerns about marine mammals—or, for that matter, has elected not to challenge four additional restrictions imposed by the District Court in this case, see *supra*, at 373 – 374—hardly means that other, more intrusive restrictions pose no threat to preparedness for war.

The Court of Appeals concluded its opinion by stating that “the Navy may return to the district court to request relief on an emergency basis” if the preliminary injunction “actually result[s] in an inability to train and certify sufficient naval forces to provide for the national defense.” 518 F.3d, at 703. This is cold comfort to the Navy. The Navy contends that the injunction will hinder efforts to train sonar operators under realistic conditions, ultimately leaving strike groups more vulnerable to enemy submarines. Unlike the Ninth Circuit, we do not think the Navy is required to wait until the injunction “actually result[s] in an inability to train ... sufficient naval forces for the national defense” before \*\*381 seeking its dissolution. By then it may be too late.

#### IV

As noted above, we do not address the underlying merits of plaintiffs' claims. While we have authority to proceed to such a decision at this point, see *Munaf*, 553 U.S., at 691 – 692, 128 S.Ct., at 2219 – 2220,

doing so is not necessary here. In addition, reaching the merits is complicated by the fact that the lower courts addressed only one of several issues raised, and plaintiffs have largely chosen not to defend the decision below on that ground.<sup>5</sup>

<sup>5</sup> The bulk of Justice GINSBURG's dissent is devoted to the merits. For the reasons stated, we find the injunctive relief granted in this case an abuse of discretion, even if plaintiffs are correct on the underlying merits. As to the injunction, the dissent barely mentions the Navy's interests. *Post*, at 392 – 393. We find that those interests, and the documented risks to national security, clearly outweigh the harm on the other side of the balance.

We agree with much of Justice BREYER's analysis, *post*, at 383 – 386 (opinion concurring in part and dissenting in part), but disagree with his conclusion that the modified conditions imposed by the stay order should remain in force until the Navy completes its EIS, *post*, at 386 – 387. The Court is reviewing the District Court's imposition of the preliminary injunction; once we conclude, as Justice BREYER does, *post*, at 386, that the preliminary injunction should be vacated, the stay order is no longer pertinent. A stay is a useful tool for managing the impact of injunctive relief *pending further appeal*, but once the Court resolves the merits of the appeal, the stay ceases to be relevant. See 518 F.3d 704, 706 (C.A.9 2008) (“[T]he partial stay ... shall remain in effect until final disposition by the Supreme Court”). Unexamined conditions imposed by the stay order are certainly no basis for what would be in effect the entry of a new preliminary injunction by this Court.

\*32 At the same time, what we have said makes clear that it would be an abuse of discretion to enter a permanent injunction, after final decision on the merits, along the same lines as the preliminary injunction. An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course. *Romero-Barcelo*, 456 U.S., at 313, 102 S.Ct. 1798 (“[A] federal judge sitting as chancellor

is not mechanically obligated to grant an injunction for every violation of law”).

The factors examined above—the balance of equities and consideration of the public interest—are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent. See *Amoco Production Co.*, 480 U.S., at 546, n. 12, 107 S.Ct. 1396 (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success”). Given that the ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training, there is no basis for enjoining such \*33 training in a manner credibly alleged to pose a serious threat to national security. This is particularly true in light of the fact that the training has been going on for 40 years with no documented episode of harm to a marine mammal. A court concluding that the Navy is required to prepare an EIS has many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS rather than the Navy's training in the interim. See, e.g., *Steffel v. Thompson*, 415 U.S. 452, 466, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (“Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction”). In the meantime, we see no basis for jeopardizing national security, as the present injunction does. Plaintiffs confirmed at oral argument that the preliminary injunction was “the whole ball game,” Tr. of Oral Arg. 33, and our analysis of the \*\*382 propriety

of preliminary relief is applicable to any permanent injunction as well.

\* \* \*

President Theodore Roosevelt explained that “the only way in which a navy can ever be made efficient is by practice at sea, under all the conditions which would have to be met if war existed.” President's Annual Message, 42 Cong. Rec. 81 (1907). We do not discount the importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines. The District Court abused its discretion by imposing a 2,200-yard shutdown zone and by requiring the Navy to power down its MFA sonar during significant surface ducting conditions. The judgment of the Court of Appeals is reversed, and the preliminary injunction is vacated to the extent it has been challenged by the Navy.

*It is so ordered.*

\*34 Justice **BREYER**, with whom Justice **STEVENS** joins as to Part I, concurring in part and dissenting in part.

As of December 2006, the United States Navy planned to engage in a series of 14 antisubmarine warfare training exercises off the southern California coast. The



Natural Resources Defense Council, Inc., and others (NRDC) brought this case in Federal District Court claiming that the National Environmental Policy Act of 1969 (NEPA) requires the Navy to prepare an environmental impact statement (EIS) (assessing the impact of the exercises on marine mammals) prior to its engaging in the exercises. As the case reaches us, the District Court has found that the NRDC will likely prevail on its demand for an EIS; the Navy has agreed to prepare an EIS; the District Court has forbidden the Navy to proceed with the exercises unless it adopts six mitigating measures; and the Navy has agreed to adopt all but two of those measures.

The controversy between the parties now concerns the two measures that the Navy is unwilling to adopt. The first concerns the “shutdown zone,” a circle with a ship at the center within which the Navy must try to spot marine mammals and shut down its sonar if one is found. The controverted condition would enlarge the radius of that circle from about one-tenth of a mile (200 yards) to one and one-quarter miles (2,200 yards). The second concerns special ocean conditions called “surface ducting conditions.” The controverted condition would require the Navy, when it encounters any such condition, to diminish the sonar's power by 75%. The Court of Appeals affirmed the District Court order that contained these two conditions. 518 F.3d 658, 703 (C.A.9 2008).

## I

We must now decide whether the District Court was legally correct in forbidding the training exercises *unless* the Navy implemented the two controverted conditions. In \*35 doing so, I assume, like the Court, that the NRDC will prevail on its demand for an EIS. (Indeed, the Navy is in the process of preparing one.) And, I would ask whether, in imposing these conditions, the District Court properly “balance[d] the harms.” See, e.g., *Amoco Production Co. v. Gambell*, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

Respondents' (the plaintiffs) argument favoring the District Court injunction is a strong one. As Justice GINSBURG well points out, see *post*, at 389 – 390 (dissenting opinion), the very point of NEPA's insistence upon the writing of an EIS is to \*\*383 force an agency “carefully” to “consider ... detailed information concerning significant environmental impacts,” while “giv[ing] the public the assurance that the agency ‘has indeed considered environmental concerns in its decisionmaking process.’ ” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). NEPA seeks to assure that when Government officials consider taking action that may affect the environment, they do so fully aware of the relevant environmental considerations. An EIS does not force them to make any particular decision, but it does lead them to take environmental considerations into account when they decide whether, or how, to act.

*Id.*, at 354, 109 S.Ct. 1835. Thus, when a decision to which EIS obligations attach is made without the informed environmental consideration that NEPA requires, much of the harm that NEPA seeks to prevent has already taken place. In this case, for example, the *absence* of an injunction means that the Navy will proceed with its exercises in the absence of the fuller consideration of environmental effects that an EIS is intended to bring. The absence of an injunction thereby threatens to cause the very environmental harm that a full preaction EIS might have led the Navy to avoid (say, by adopting the two additional mitigation measures that the NRDC proposes). Consequently, if the exercises are to continue, conditions designed to mitigate interim environmental harm may well be appropriate.

**\*36** On the other hand, several features of this case lead me to conclude that the record, as now before us, lacks adequate support for an injunction imposing the two controverted requirements. *First*, the evidence of need for the two special conditions is weak or uncertain. The record does show that the exercises as the Navy originally proposed them could harm marine mammals. The District Court found (based on the Navy's study of the matter) that the exercises might cause 466 instances of Level A harm and 170,000 instances of Level B harm. App. to Pet. for Cert. 196a–197a. (The environmental assessment actually predicted 564 instances of Level A harm. See App. 223–224.) The study defines Level A injury as “any act that injures or has the significant potential to injure a marine mammal or

marine mammal stock in the wild” through “destruction or loss of biological tissue,” whether “slight to severe.” *Id.*, at 160. It defines Level B harm as “ ‘any act that disturbs or is likely to disturb a marine mammal ... by causing disruption of natural behavioral patterns including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering to a point where such behaviors are abandoned or significantly altered’ ” and describes it as a “short term” and “temporary” “disturbance.” *Id.*, at 161, 175.

The raw numbers seem large. But the parties argue about the extent to which they mean likely harm. The Navy says the classifications and estimates err on the side of caution. (When in doubt about the amount of harm to a mammal, the study assumed the harm would qualify as Level A harassment. *Id.*, at 200.) The Navy also points out that, by definition, mammals recover from Level B injuries, often very quickly. It notes that, despite 40 years of naval exercises off the southern California coast, no injured marine mammal has ever been found. App. to Pet. for Cert. 274a–275a. (It adds that dolphins often swim alongside the ships. *Id.*, at 290a, 346a.) At the same time, plaintiffs point to instances where whales have been found stranded. They add **\*37** that scientific studies have found a connection between those beachings and the Navy's use of sonar, see, e.g., App. 600–602, and the **\*\*384** Navy has acknowledged one stranding where “U.S. Navy mid-frequency sonar has been identified as the most plausible contributory source to the stranding event,” *id.*, at 168.

Given the uncertainty the figures create in respect to the harm caused by the Navy's original training plans, it would seem important to have before us at least some estimate of the harm likely avoided by the Navy's decision not to contest here *four of the six mitigating conditions* that the District Court ordered. Without such evidence, it is difficult to assess the *relevant* harm—that is, the environmental harm likely caused by the Navy's exercises with the four uncontested mitigation measures (but without the two contested mitigation measures) in place.

*Second*, the Navy has filed multiple affidavits from Navy officials explaining in detail the seriousness of the harm that the delay associated with completion of this EIS (approximately one year) would create in respect to the Navy's ability to maintain an adequate national defense. See generally App. to Pet. for Cert. 260a–357a. Taken by themselves, those affidavits make a strong case for the proposition that insistence upon the two additional mitigating conditions would seriously interfere with necessary defense training.

The affidavits explain the importance of training in antisubmarine warfare, *id.*, at 263a; the need to use active sonar to detect enemy submarines, *id.*, at 266a–267a, App. 566; the complexity of a training exercise involving sonar, App. to Pet. for Cert. 343a; the need for realistic conditions when training exercises take place, *id.*, at 299a–300a, App. 566; the “cascading” negative “effect” that delay in one important aspect of a set of coordinated training exercises

has upon the Navy's ability “to provide combat ready forces,” App. to Pet. for Cert. 343a; the cost and disruption that would accompany the adoption of the two additional mitigating conditions that \*38 the NRDC seeks, *ibid.*; the Navy's resulting inability adequately to train personnel, *id.*, at 278a; the effectiveness of the mammal-protecting measures that the Navy has taken in the past, *id.*, at 285a–298a; and the reasonable likelihood that the mitigating conditions to which it has agreed will prove adequate, *id.*, at 296a.

*Third*, and particularly important in my view, the District Court did not explain *why* it rejected the Navy's affidavit-supported contentions. In its first opinion enjoining the use of sonar, the District Court simply stated:

“The Court is ... satisfied that the balance of hardships tips in favor of granting an injunction, as the harm to the environment, Plaintiffs, and public interest outweighs the harm that Defendants would incur if prevented from using [mid-frequency active (MFA) ] sonar, absent the use of effective mitigation measures, during a subset of their regular activities in one part of one state for a limited period.” *Id.*, at 217a–218a.

Following remand from the Court of Appeals, the District Court simply repeated, word for word, this same statement. It said:

“The Court is ... satisfied that the balance of hardships tips in favor of granting an injunction, as the harm

to the environment, Plaintiffs, and public interest outweighs the harm that Defendants would incur (or the public interest would suffer) if Defendants were prevented from using MFA sonar, absent the use of effective mitigation measures, during a subset of their regular activities in one part of one state for a limited period.” [530 F.Supp.2d 1110, 1118 \(C.D.Cal.2008\)](#).

With respect to the imposition of the 2,200-yard shutdown zone, the District Court **\*\*385** noted evidence of the harm that MFA sonar poses to marine mammals, and then concluded that “[t]he Court therefore is persuaded that while the 2200 yard shutdown requirement may protect marine mammals **\*39** from the harshest of sonar-related consequences, it represents a minimal imposition [on] the Navy’s training exercises.” *Id.*, at 1119. The District Court did not there explain the basis for that conclusion. With respect to the imposition of the surface ducting condition, the District Court said nothing about the Navy’s interests at all. *Id.*, at 1120–1121.

While a district court is often free simply to state its conclusion in summary fashion, in this instance neither that conclusion, nor anything else I have found in the District Court’s opinion, answers the Navy’s documented claims that the two extra conditions the District Court imposed will, in effect, seriously interfere with its ability to carry out necessary training exercises.

The first condition requires the Navy to reduce the power of its sonar equipment by 75% when the ship encounters a condition called “surface ducting” that occurs when

the presence of layers of water of different temperature make it unusually difficult for sonar operators to determine whether a diesel submarine is hiding below. Rear Admiral John Bird, an expert in submarine warfare, made clear that the 75% power-reduction requirement was equivalent to forbidding any related training. App. to Pet. for Cert. 297a. But he says in paragraph 52 of his declaration: “Training in surface ducting conditions is critical to effective training because sonar operators need to learn how sonar transmissions are altered due to surface ducting and how submarines may take advantage of them.” *Id.*, at 299a–300a. The District Court, as far as I can tell, did not even acknowledge in its opinion the Navy’s asserted interest in being able to train under these conditions. [530 F.Supp.2d, at 1120–1121](#).

The second condition requires the Navy to expand the sonar “shutdown” area surrounding a ship (*i.e.*, turn off the sonar if a mammal is spotted in the area) from a circle with a radius of about one-tenth of a mile to a circle with a radius of about one mile and a quarter. Both sides agree that this **\*40** requirement will lead to more shutdowns. Admiral Gary Roughead, Chief of Naval Operations, states in paragraph 12 of his declaration that this expanded zone requirement “will result in increased interruptions to training exercises, ... vastly increas[ing] the risk of negating training effectiveness, preventing strike group certification, and disrupting carefully orchestrated deployment plans to meet world-wide operational commitments.” App. to Pet. for Cert. 344a. Again, I can find



nothing in the District Court's opinion that specifically explains why this is not so. [530 F.Supp.2d](#), at 1119–1120.

*Fourth*, the Court of Appeals sought, through its own thorough examination of the record, to supply the missing explanations. But those explanations are not sufficient. In respect to the surface ducting conditions, the Court of Appeals rejected the Navy's contentions on the ground that those conditions are “rar[e],” and the Navy has certified trainings that did not involve any encounter with those conditions. [518 F.3d](#), at 701–702. I am not certain, however, why the rarity of the condition supports the District Court's conclusion. Rarity argues as strongly for training when the condition is encountered as it argues for the contrary.

In respect to the expansion of the “shutdown” area, the Court of Appeals noted that (1) the Navy in earlier exercises had shut down its sonar when marine mammals were sited within about one-half a **\*\*386** mile, (2) the Navy has used a larger shutdown area when engaged in exercises with lower frequency sonar equipment, and (3) foreign navies have used larger shutdown areas. *Id.*, at 699–701, and nn. 63, 67. But the Navy's affidavits state that (1) earlier shutdowns when marine mammals were spotted at farther distances “likely occurred during tactically insignificant times,” App. to Pet. for Cert. 356a, (2) ships with low frequency sonar (unlike the sonar here at issue) have equipment that makes it easier to monitor the larger area, particularly by significantly reducing the number of monitoring personnel necessarily involved,

and (3) foreign navy experience is not relevant given the **\*41** potentially different military demands upon those navies, App. 508–509.

Finally, the Court of Appeals, mirroring a similar District Court suggestion in the language I have quoted, says that “the exercises in southern California are only a subset of the Navy's training activities involving active sonar.” [518 F.3d](#), at 702. It adds that the Navy's study “shows the Navy is still able to conduct its exercises in alternative locations, in reduced number, or through simulation.” *Ibid.*, n. 69. The Court of Appeals, however, also concluded that the study “provides reasonably detailed justifications for why the Southern California Operating Area is uniquely suited to these exercises, and demonstrates that the Navy would suffer a certain hardship if the considered alternatives were employed instead.” *Ibid.*

*Fifth*, when the Court of Appeals first heard this case following the District Court's imposition of a broad, absolute injunction, it held that any injunction must be crafted so that the Navy could continue its training exercises. Noting that the Navy had, in the past, been able to use mitigation measures to “reduce the harmful effects of its active sonar,” it “vacate[d] the stay and remand[ed] this matter to the district court to narrow its injunction so as to provide mitigation conditions *under which the Navy may conduct its training exercises.*” [508 F.3d](#) 885, 887 (C.A.9 2007) (emphasis added). For the reasons just stated, neither the District Court nor the Court of Appeals has explained

why we should reject the Navy's assertions that it cannot effectively conduct its training exercises under the mitigation conditions imposed by the District Court.

I would thus vacate the preliminary injunction imposed by the District Court to the extent it has been challenged by the Navy. Neither the District Court nor the Court of Appeals has adequately explained its conclusion that the balance of the equities tips in favor of plaintiffs. Nor do those parts of the record to which the parties have pointed supply the missing explanation.

## \*42 II

Nonetheless, as the Court of Appeals held when it first considered this case, the Navy's past use of mitigation conditions makes clear that the Navy can effectively train under *some* mitigation conditions. In the ordinary course, I would remand so the District Court could, pursuant to the Court of Appeals' direction, set forth mitigation conditions that will protect the marine wildlife while also enabling the Navy to carry out its exercises. But, at this point, the Navy has informed us that this set of exercises will be complete by January, at the latest, and an EIS will likely be complete at that point, as well. Thus, by the time the District Court would have an opportunity to impose new conditions, the case could very well be moot.

In February of this year, the Court of Appeals stayed the injunction imposed by the District Court—but *only pending this Court's resolution of the case*. The Court

**\*\*387** of Appeals concluded that “[i]n light of the short time before the Navy is to commence its next exercise, the importance of the Navy's mission to provide for the national defense and the representation by the Chief of Naval Operations that the district court's preliminary injunction in its current form will ‘unacceptably risk’ effective training and strike group certification and thereby interfere with his statutory responsibility ... to ‘organiz[e], train[ ], and equip[ ] the Navy,’ ” interim relief was appropriate, and the court then modified the two mitigation conditions at issue. [518 F.3d 704, 705 \(C.A.9 2008\)](#).

With respect to the 2,200-yard shutdown zone, it required the Navy to suspend its use of the sonar if a marine mammal is detected within 2,200 yards, *except* when sonar is being used at a “critical point in the exercise,” in which case the amount by which the Navy must power down is proportional to the mammal's proximity to the sonar. *Id.*, at 705–706 (internal quotation marks omitted). With respect to surface ducting, the Navy is only required to shut down sonar altogether **\*43** when a marine mammal is detected within 500 meters and the amount by which it is otherwise required to power down is again proportional to the mammal's proximity to the sonar source. *Ibid.* The court believed these conditions would permit the Navy to go forward with its imminently planned exercises while at the same time minimizing the harm to marine wildlife.

In my view, the modified conditions imposed by the Court of Appeals in its February stay order reflect the best equitable conditions



that can be created in the short time available before the exercises are complete and the EIS is ready. The Navy has been training under these conditions since February, so allowing them to remain in place will, in effect, maintain what has become the status quo. Therefore, I would modify the Court of Appeals' February 29, 2008, order so that the provisional conditions it contains remain in place until the Navy's completion of an acceptable EIS.

Justice [GINSBURG](#), with whom Justice [SOUTER](#) joins, dissenting.

The central question in this action under the National Environmental Policy Act of 1969 (NEPA) was whether the Navy must prepare an environmental impact statement (EIS). The Navy does not challenge its obligation to do so, and it represents that the EIS will be complete in January 2009—one month after the instant exercises conclude. If the Navy had completed the EIS before taking action, as NEPA instructs, the parties and the public could have benefited from the environmental analysis—and the Navy's training could have proceeded without interruption. Instead, the Navy acted first, and thus thwarted the very purpose an EIS is intended to serve. To justify its course, the Navy sought dispensation not from Congress, but from an executive council that lacks authority to countermand or revise NEPA's requirements. I would hold that, in imposing manageable measures to mitigate harm until completion of the \*44 EIS, the District Court conscientiously balanced the equities and did not abuse its discretion.

## I

In December 2006, the Navy announced its intent to prepare an EIS to address the potential environmental effects of its naval readiness activities in the Southern California (SOCAL) Range Complex. See [71 Fed.Reg. 76639 \(2006\)](#). These readiness activities include expansion and intensification of naval training, as well as research, development, and testing of various systems and weapons. *Id.*, at 76639, 76640. The EIS process is underway, and the \*\*388 Navy represents that it will be complete in January 2009. Brief for Petitioners 11; Tr. of Oral Arg. 11.

In February 2007, seeking to commence training before completion of the EIS, the Navy prepared an environmental assessment (EA) for the 14 exercises it planned to undertake in the interim. See App. to Pet. for Cert. 235a.<sup>1</sup> On February 12, the Navy concluded the EA with a finding of no significant impact. App. 225–226. The same day, the Navy commenced its training exercises. *Id.*, at 227 (“The Proposed Action is hereby implemented.”).

<sup>1</sup> An EA is used “for determining whether to prepare” an EIS. *Department of Transportation v. Public Citizen*, 541 U.S. 752, 757, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004) (quoting 40 CFR § 1508.9(a) (2003)); see *ante*, at 371–372 (opinion of the Court). By definition, an EA alone does not satisfy an agency's obligation under NEPA if the effects of a proposed action require preparation of a full EIS.

On March 22, 2007, the Natural Resources Defense Council, Inc. (NRDC), filed suit in the U.S. District Court for the Central

District of California, seeking declaratory and injunctive relief based on the Navy's alleged violations of NEPA and other environmental statutes. As relevant here, the District Court determined that NRDC was likely to succeed on its NEPA claim and that equitable principles warranted preliminary relief. On August 7, 2007, the court **\*45** enjoined the Navy's use of mid-frequency active (MFA) sonar during the 11 remaining exercises at issue.

On August 31, the Court of Appeals for the Ninth Circuit stayed the injunction pending disposition of the Navy's appeal, and the Navy proceeded with two more exercises. In a November 13 order, the Court of Appeals vacated the stay, stating that NRDC had shown "a strong likelihood of success on the merits" and that preliminary injunctive relief was appropriate. [508 F.3d 885, 886 \(2007\)](#). The Court of Appeals remanded, however, instructing the District Court to provide mitigation measures under which the Navy could conduct its remaining exercises.

On remand, the District Court received briefing from both parties. In addition, the court "toured the *USS Milius* at the naval base in San Diego, California, to improve its understanding of the Navy's sonar training procedures and the feasibility of the parties' proposed mitigation measures. [Counsel for both \[parties\] were present.](#)" [530 F.Supp.2d 1110, 1112 \(2008\)](#). On January 3, 2008, the District Court entered a modified preliminary injunction imposing six mitigation measures. The court revised the modified injunction slightly on January 10 in response to filings by the Navy,

and four days later, denied the Navy's application for a stay pending appeal.

On the following day, January 15, the Council on Environmental Quality (CEQ), an advisory body within the Executive Office of the President, responded to the Navy's request for "alternative arrangements" for NEPA compliance. App. to Pet. for Cert. 233a. The "arrangements" CEQ set out purported to permit the Navy to continue its training without timely environmental review. *Id.*, at 241a–247a. The Navy accepted the arrangements on the same day. App. 228.

The Navy then filed an emergency motion in the Court of Appeals requesting immediate vacatur of the District Court's modified injunction. CEQ's action, the Navy urged, **\*46** eliminated the injunction's legal foundation. In the alternative, the Navy sought a stay of two aspects of the injunction pending its appeal: the 2,200–yard mandatory shutdown zone and the power-down requirement in significant **\*\*389** surface ducting conditions, see *ante*, at 373 – 374 (opinion of the Court). While targeting in its stay application only two of the six measures imposed by the District Court, the Navy explicitly reserved the right to challenge on appeal each of the six mitigation measures. Responding to the Navy's emergency motion, the Court of Appeals remanded the matter to allow the District Court to determine in the first instance the effect of the intervening executive action. Pending its own consideration of the Navy's motion, the

District Court stayed the injunction, and the Navy conducted its sixth exercise.

On February 4, after briefing and oral argument, the District Court denied the Navy's motion. The Navy appealed, reiterating its position that CEQ's action eliminated all justification for the injunction. The Navy also argued that vacatur of the entire injunction was required irrespective of CEQ's action, in part because the "conditions imposed, in particular the 2,200 yard mandatory shutdown zone and the six decibel (75%) power-down in significant surface ducting conditions, severely degrade the Navy's training." Brief for Appellants in No. 08–55054(CA9), p. 15. In the February 29 decision now under review, the Court of Appeals affirmed the District Court's judgment. 518 F.3d 658, 703 (2008). The Navy has continued training in the meantime and plans to complete its final exercise in December 2008.

As the procedural history indicates, the courts below determined that an EIS was required for the 14 exercises. The Navy does not challenge that decision in this Court. Instead, the Navy defends its failure to complete an EIS before launching the exercises based upon CEQ's "alternative arrangements"—arrangements the Navy sought and obtained in order to overcome the lower courts' rulings. As \*47 explained below, the Navy's actions undermined NEPA and took an extraordinary course.

## II

NEPA "promotes its sweeping commitment" to environmental integrity "by focusing Government and public attention on the environmental effects of proposed agency action." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). "By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Ibid.*

The EIS is NEPA's core requirement. *Department of Transportation v. Public Citizen*, 541 U.S. 752, 757, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004). This Court has characterized the requirement as "action-forcing." *Andrus v. Sierra Club*, 442 U.S. 347, 350, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979) (internal quotation marks omitted). Environmental concerns must be "integrated into the very process of agency decisionmaking" and "interwoven into the fabric of agency planning." *Id.*, at 350–351, 99 S.Ct. 2335. In addition to discussing potential consequences, an EIS must describe potential mitigation measures and alternatives to the proposed course of action. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351–352, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989) (citing 40 CFR §§ 1508.25(b), 1502.14(f), 1502.16(h), 1505.2(c) (1987)). The EIS requirement "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been

committed or the die otherwise cast.” 490 U.S., at 349, 109 S.Ct. 1835.

“Publication of an EIS ... also serves a larger informational role.” *Ibid.* It demonstrates that an agency has indeed considered environmental concerns, and **\*\*390** “perhaps more significantly, provides a springboard for public comment.” *Ibid.* At the same time, it affords other affected governmental bodies “notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner.” *Id.*, at 350, 109 S.Ct. 1835.

**\*48** In light of these objectives, the timing of an EIS is critical. CEQ regulations instruct agencies to “integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values.” 40 CFR § 1501.2 (1987). An EIS must be prepared “early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.” *Andrus*, 442 U.S., at 351–352, n. 3, 99 S.Ct. 2335 (quoting 43 Fed.Reg. 55995 (1478) (codified in 40 CFR § 1502.5 (1979))).

The Navy's publication of its EIS in this case, scheduled to occur *after* the 14 exercises are completed, defeats NEPA's informational and participatory purposes. The Navy's inverted timing, it bears emphasis, is the very reason why the District Court had to confront the question of mitigation measures at all. Had the Navy prepared a legally sufficient EIS before beginning

the SOCAL exercises, NEPA would have functioned as its drafters intended: The EIS process and associated public input might have convinced the Navy voluntarily to adopt mitigation measures, but NEPA itself would not have impeded the Navy's exercises. See *Public Citizen*, 541 U.S., at 756, 769, n. 2, 124 S.Ct. 2204 (noting that NEPA does not mandate particular results, but rather establishes procedural requirements with a “focus on improving agency decisionmaking”).

The Navy had other options. Most importantly, it could have requested assistance from Congress. The Government has sometimes obtained congressional authorization to proceed with planned activities without fulfilling NEPA's requirements. See, e.g., Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub.L. 106–398, § 317, 114 Stat. 1654A–57 (exempting the military from preparing a programmatic EIS for low-level flight training); 42 U.S.C. § 10141(c) (2000 ed.) (exempting the Environmental Protection Agency from preparing an EIS for the development of criteria for handling spent nuclear fuel and high-level **\*49** radioactive waste); 43 U.S.C. § 1652(d) (exempting construction of the trans-Alaska oil pipeline from further NEPA compliance).

Rather than resorting to Congress, the Navy “sought relief from the Executive Branch.” *Ante*, at 373 (opinion of the Court). On January 10, 2008, the Navy asked CEQ, adviser to the President, to approve alternative arrangements for NEPA compliance pursuant to 40 CFR § 1506.11



(1987). App. to Pet. for Cert. 233a; see *ante*, at 373, n. 3. The next day, the Navy submitted supplementary material to CEQ, including the Navy's EA and after-action reports, the District Court's orders, and two analyses by the National Marine Fisheries Service (NMFS). App. to Pet. for Cert. 237a–238a. Neither the Navy nor CEQ notified NRDC, and CEQ did not request or consider any of the materials underlying the District Court orders it addressed.

Four days later, on January 15, the Chairman of CEQ issued a letter to the Secretary of the Navy. Repeating the Navy's submissions with little independent analysis, the letter stated that the District Court's orders posed risks to the Navy's training exercises. See *id.*, at 238a (“You have explained that the training restrictions set forth in the ... injunctive orders prevent the Navy from providing Strike Groups with adequate proficiency training **\*\*391** and create a substantial risk of precluding certification of the Strike Groups as combat ready.”).

The letter continued:

“Discussions between our staffs, your letter and supporting documents, and the classified declaration and briefings I have received, have clearly determined that the Navy cannot ensure the necessary training to certify strike groups for deployment under the terms of the injunctive orders. Based on the record supporting your request ... CEQ has concluded that the Navy must be able to conduct the [exercises] ... in a timeframe that does not provide sufficient time to complete an EIS.

**\*50** Therefore, emergency circumstances are present for the nine exercises and alternative arrangements for compliance with NEPA under CEQ regulation [40 C.F.R. § 1506.11](#) are warranted.” *Id.*, at 240a.

The alternative arrangements CEQ set forth do not vindicate NEPA's objectives. The arrangements provide for “public participation measures,” which require the Navy to provide notices of the alternative arrangements. *Id.*, at 241a, 242a. The notices must “seek input on the process for reviewing post-exercise assessments” and “include an offer to meet jointly with Navy representatives ... and CEQ to discuss the alternative arrangements.” *Id.*, at 242a–243a. The alternative arrangements also describe the Navy's existing research and mitigation efforts. *Id.*, at 243a–247a.

CEQ's hasty decision on a one-sided record is no substitute for the District Court's considered judgment based on a two-sided record.<sup>2</sup> More fundamentally, even an exemplary CEQ review could not have effected the short circuit the Navy sought. CEQ lacks authority to absolve an agency of its statutory duty to prepare an EIS. NEPA established CEQ to assist and advise the President on environmental policy, [42 U.S.C. § 4342](#), and a 1977 Executive Order charged CEQ with issuing regulations to federal agencies for implementation of NEPA's procedural provisions, [Exec. Order No. 11991](#), 3 CFR 123 (1977 Comp.). This Court has recognized that CEQ's regulations are entitled to “substantial deference,” [Robertson](#), 490 U.S., at 355, 109 S.Ct. 1835,

and 40 CFR § 1506.11 indicates that CEQ may play an important consultative role in emergency circumstances, but we have never suggested that CEQ could eliminate the statute's command. If the \*51 Navy sought to avoid its NEPA obligations, its remedy lay in the Legislative Branch. The Navy's alternative course—rapid, self-serving resort to an office in the White House—is surely not what Congress had in mind when it instructed agencies to comply with NEPA “to the fullest extent possible.” 42 U.S.C. § 4332.<sup>3</sup>

2 The District Court may well have given too spare an explanation for the balance of hardships in issuing its injunction of August 7, 2007. The court cured any error in this regard, however, when it closely examined each mitigation measure in issuing the modified injunction of January 3, 2008. The Court of Appeals, too, conducted a detailed analysis of the record.

3 On the same day that CEQ issued its letter, the President granted the Navy an exemption from the requirements of the Coastal Zone Management Act of 1972 (CZMA) pursuant to 16 U.S.C. § 1456(c)(1) (B) (2006 ed.). That exemption, expressly authorized by the CZMA, does not affect NRDC's NEPA claim.

### III

#### A

Flexibility is a hallmark of equity jurisdiction. “The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to \*\*392 the necessities of the particular case. Flexibility rather than rigidity has distinguished it.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102

S.Ct. 1798, 72 L.Ed.2d 91 (1982) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944)). Consistent with equity's character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, courts have evaluated claims for equitable relief on a “sliding scale,” sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high. 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948.3, p. 195 (2d ed.1995). This Court has never rejected that formulation, and I do not believe it does so today.

Equity's flexibility is important in the NEPA context. Because an EIS is the tool for *uncovering* environmental harm, environmental plaintiffs may often rely more heavily on their probability of success than the likelihood of harm. The Court is correct that relief is not warranted “simply to prevent the possibility of some remote future injury.” \*52 *Ante*, at 375 (quoting Wright & Miller, *supra*, § 2948.1, at 155). “However, the injury need not have been inflicted when application is made or be certain to occur; a strong threat of irreparable injury before trial is an adequate basis.” Wright & Miller, *supra*, § 2948.1, at 155–156 (footnote omitted). I agree with the District Court that NRDC made the required showing here.

#### B

The Navy's own EA predicted substantial and irreparable harm to marine mammals.



Sonar is linked to mass strandings of marine mammals, hemorrhaging around the brain and ears, acute spongiotic changes in the central nervous system, and lesions in vital organs. *E.g.*, App. 600–602; *id.*, at 360–362, 478–479. As the Ninth Circuit noted, the EA predicts that the Navy's “use of MFA sonar in the SOCAL exercises will result in 564 instances of physical injury including permanent hearing loss (Level A harassment) and nearly 170,000 behavioral disturbances (Level B harassment), more than 8,000 of which would also involve temporary hearing loss.” 518 F.3d, at 696; see App. 223–224. Within those totals,

“the EA predicts 436 Level A harassments of Cuvier's beaked whales. According to [the National Oceanic and Atmospheric Administration (NOAA)], as few as 1,121 ... may exist in California, Oregon and Washington combined. Likewise, the EA predicts 1,092 Level B harassments of bottlenose dolphins, of which only 5,271 may exist in the [California Coastal and Offshore stocks](#).” 518 F.3d, at 691–692.

The majority acknowledges the lower courts' findings, *ante*, at 374, but also states that the EA predicted “only eight Level A harassments of common dolphins each year” and “274 Level B harassments of beaked whales per year, none of which would result in permanent injury,” *ante*, at 372. Those numbers do not fully capture the EA's predictions.

**\*53** The EA classified the harassments of beaked whales as Level A, not Level B. The EA does indeed state that “modeling predicts non-injurious Level B exposures.”

App. 185. But, as the majority correctly notes, *ante*, at 372, the EA also states that “all beaked whale exposures are counted as Level A,” App. 185. The EA counted the predicted exposures as Level A “[b]y Navy policy developed in conjunction with NMFS.” *Id.*, at 200. The record reflects “the known sensitivity of these species to tactical sonar,” *id.*, at 365 (NOAA letter), **\*\*393** and as the majority acknowledges, beaked whales are difficult to study, *ante*, at 372. Further, as the Ninth Circuit noted, “the EA ... maintained that the methodology used was based on the ‘best available science.’ ” 518 F.3d, at 669.<sup>4</sup>

<sup>4</sup> The majority reasons that the environmental harm deserves less weight because the training exercises “have been taking place in SOCAL for the last 40 years,” such that “this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment.” *Ante*, at 376. But the EA explains that the proposed action is not a continuation of the “status quo training.” App. 128. Instead, the EA is based on the Navy's proposal to employ a “surge” training strategy, *ibid.*, in which the commander “would have the option to conduct two concurrent major range events,” *id.*, at 124.

In my view, this likely harm—170,000 behavioral disturbances, including 8,000 instances of temporary hearing loss; and 564 Level A harms, including 436 injuries to a beaked whale population numbering only 1,121—cannot be lightly dismissed, even in the face of an alleged risk to the effectiveness of the Navy's 14 training exercises. There is no doubt that the training exercises serve critical interests. But those interests do not authorize the Navy to violate a statutory command, especially when recourse to the Legislature remains open. “Of course, military interests do not

always trump other considerations, and we have not held that they do.” *Ante*, at 378.

In light of the likely, substantial harm to the environment, NRDC's almost inevitable success on the merits of its claim \*54 that NEPA required the Navy to prepare an EIS, the history of this litigation, and the public interest, I cannot agree that the mitigation measures the District Court imposed signal an abuse of discretion. Cf. *Amoco Production Co. v. Gambell*, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) (“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or

at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.”).

For the reasons stated, I would affirm the judgment of the Ninth Circuit.

#### All Citations

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